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REPORTS OF CASES

DECIDED IN

The High Court of Chancery in England.

EDITED

BY E. D. INGRAHAM, ESQ.

COUNSELLOR AT LAW.

VOL. IV.

Containing the Cases decided by Lord Eldon, Lord Chancellor; Sir Thomas Plumer, Master of the Rolls; and Sir John Leach, Vice-Chancellor, as reported by Mr JACOB: and by Lord Lyndhurst, Lord Chancellor; Sir John Leach, Master of the Rolls; and Sir Launcelot Shadwell, Vice-Chancellor, as reported by Messrs RUSSELL AND MYLNE in the first volume of their Reports.

Philadelphia:

GRIGG & ELLIOT, No. 9 NORTH FOURTH STREET.

1833.

Entered according to the act of congress, in the year 1833, by Grigg and Elliot, in the clerk's office of the district court for the eastern district of Pennsylvania.

Philadelphia:
Printed by James Kay, Jun. & Co.
Race above 4th Street.

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ENGLISH

CASES IN CHANCERY.

BEFORE LORD ELDON, LORD CHANCELLOR; SIR THOMAS PLUMER, MASTER OF THE ROLLS; AND SIR JOHN LEACH, VICE-CHANCELLOR, OF ENGLAND.

The Case of Queen's College, Cambridge.

Jacob, 1.

The statutes of a college directing that the president on his election should be admitted, and prescribing an oath to be taken by him and some other ceremonies to be performed, held, upon evidence of a particular form of admission besides the oath and ceremonies mentioned in the statutes having been used, and upon the ground that in such offices the admission is generally a distinct act, that the admission did not consist in taking the oath, and going through the ceremonies mentioned in the statutes, but in the observance of that particular form.

The president elect did not therefore forfeit his office by taking the oath and going through those ceremonies, without having previously subscribed the declaration required by the act of uniformity.

In a college of royal foundation, a practice having for many years prevailed of electing two fellows of a county, for which the statutes allowed only one, a dispensation from the crown authorising that practice was presumed.

In the exercise of the visitorial jurisdiction the Lord Chancellor is not bound by any exact forms of proceeding.

Quære. Whether subscribing the declaration of conformity within a reasonable time after admission to an office be not a sufficient compliance with the statute of uniformity.

Quære. Whether the officer before whom the declaration of conformity is to be signed is bound to permit the subscription on a Sunday.

Semble. The meaning of the act of uniformity is, that the party is to subscribe the declaration as soon as it is in his power.

A dispensation with a college statute presumed from a practice and opinion contrary to it having prevailed for many years.

The crown as visitor of a college of royal foundation may by a perpetual dispensation authorise a practice of having a greater number of fellows of a particular county than the statutes allow.

Where possession of property of a certain amount is required as a qualification for the office of

[Case of Queen's College.]

president of a college, it is not necessary for a candidate to produce his qualification at the election.

By college statutes, the possession of 10*l.* per annum disqualifies from holding a fellowship.

The master and fellows having a power to interpret ambiguous passages, may raise the amount in proportion to the decrease of the value of money. *Semble*, By the same statutes, the master must possess 20*l.* per annum. It is not necessary that the amount of this sum should vary with the other.

In college statutes making the possession of property a disqualification, real estate alone is in general considered.

When real property is required as a qualification by college statutes, the modern doctrines of equity are not to be too rigidly applied in determining what is real; and, therefore, an interest in land which in a court of equity would be deemed personal estate may satisfy the statute.

The effect of the act of uniformity in the case of a party neglecting to subscribe, is to render his office void without a judicial sentence.

Semble. The fellows of a college being required to elect a president within a certain time after a vacancy, if the elected president neglects to subscribe the declaration of conformity before his admission, his office is *ipso facto* void, and a new election must take place within the specified time.

Costs of petitions to the visitor of a college relative to the election of the president paid out of the college funds.

Jan. 20, 22, 24, 25, 26. Feb. 15, 17, 20. March 20, 27, 31.

THIS case came before the Lord Chancellor, acting on behalf of his majesty as visitor of Queen's College in the University of Cambridge, upon two petitions against the election and admission of the Reverend H. Godfrey, B.D., as president of that society.

The college is of royal foundation, and was endowed by the consort of king Henry VI., and by the lady Elizabeth, consort of king Edward IV., the latter of whom, about the year 1475, gave a body of statutes for its government. These were afterwards revised by commissioners sent down in the year 1559 by queen Elizabeth as visitor. The statute concerning the election of president is as follows:

"Statuimus, quod, vacante officio præsidentis hujus nostri collegii, statim infra quatuor dies immediate sequentes vacationis diem vel saltem quam cito cognoverint socii officium vacare, senior omnium sociorum (si tunc in villa Cantabrigiæ præsens esse possit, alioqui senior socius tunc domi præsens, et juxta admissionem in ordine proximus) convocet omnes socios in villa præsentes innotescendo eisdem vacationem officii præsidentis; et idem senior antequam recedat injungat eisdem sociis sic congregatis ut, si fieri possit, octava die post ejusdem officii vacationem, ipsa die vacationis minime computata, singuli socii in villa præsentes iterum conveniant in capellâ collegii, certa hora per dictum seniorem limitanda, ad providendum eidem collegio de utili et idoneo præsidente.

"Octava vero die, convocatis iterum omnibus sociis tunc in villa præsentibus (absentibus tunc sociis a danda voce in hac electione penitus seclusis), senior prædictus eosdem hortetur ac illis injungat sub hac quæ sequitur forma. 'Injungo vobis, in virtute Jesu Christi et sub periculo animarum vestrarum, ut virum magis idoneum vestro judicio, omni partialitate remota, in præsidentem hujus collegii eligatis, secundum Deum: qui sit vir providus, discretus, competenter literatus, in universitate aliqua hujus regni Doctoratus titulo insignitus, vel ad minus in Baccalaureorum Theologiæ ordinem cooptatus, in spiritualibus et temporalibus circumspectus, honestate morum præclarus, conversationis laudabilis, atque famæ redolentis, qui et melius sciverit atque poterit negotia collegii promovere;

dum tamen sacerdos fuerit, et expendere poterit annuatim ad minus viginti libras.'

"Peracta injunctione ista, hymnus 'Veni, Creator Spiritus' ab omnibus sociis præsentibus in capellâ, invocando Spiritus Sancti gratiam, solemniter decantetur; cum oratione 'Deus qui corda fidelium, &c.' Quo facto senior socius prædictus associet sibi duos alios socios maxime seniores præsentium juxta admissionem; quibus simul stantibus ad mensam domini præfatæ capellæ, primo senior antedictus coram duobus aliis suffragium suum propria manu scribat; postea vero alii duo scribant singulatim suffragia sua manibus propriis; et deinde omnes alii socii præsentes, singulatim pacifice et sine murmure vel strepitu (sub pœna expulsionis à collegio ipso facto), sua suffragia coram prædictis tribus senioribus deponant et scribant suis propriis manibus, sub hac forma vel consimili, 'Ego N. eligo N. ad officium præsidentis hujus collegii.' Quibus sic conscriptis in una schedula, præfatus senior, vel alius quisquam illorum trium, suffragia eadem aperte et distincte legat coram omnibus sociis præsentibus; et in quem major pars sociorum omnium tam præsentium quam absentium consenserit, ille pro electo habeatur absque contradictione cujuscunque: quam electionem dictus senior antequam recedat sub hac forma pronunciare teneatur: 'In nomine Patris et Filii et Spiritus Sancti, ego N. senior socius hujus collegii nomine meo et nomine omnium sociorum meorum, sive majoris partis eorundem, eligo et electum pronuncio N. in præsidentem hujus collegii.' Si autem contingat majorem partem sociorum non convenire in unam personam, tunc omnes et singuli socii vota et suffragia sua singulatim rursum et de novo scribant juxta formam præscriptam, et sic faciant ter si toties majori parti sociorum videbitur expedire: et si nequiverint adhuc concordare, tandem compromittant omnes et singuli socii præsentes sua suffragia in quinque socios de maxime senioribus omnium præsentium, et in quem major pars ipsorum quinque seniorum consenserit (quos arctamus, sub pœna amissionis suarum societatum ipso facto, ut electionem perficiant ante horam duodecimam ejusdem diei ibidem) pro electo habeatur, absque hæsitatione vel contradictione quacunque. Quam electionem præfatus senior, sub pœna incurrendi manifestum perjurium, et sub periculo perpetuæ expulsionis a collegio, teneatur pronunciare, et personam sic electam admittere; faciatque electum præsidentem inquiri, et coram communitate collegii, in capellâ ejusdem, ad mensam domini ex collegii sumptu personaliter præsentari: quo præsente psalmum 'Te Deum laudamus,' omnes socii præsentes solemniter cantent; et postea electus presidens præstabit hoc quod sequitur juramentum, seniore socio id ipsum exigente."

Then followed the oath of the president; after which the statute proceeded thus:

"Quo facto senior socius librum statutorum clavesque cistarum quæ ad officium præsidentis pertinere noscuntur illico tradere non postponat."

The forms for the election of fellows were as follows:

"Electio autem sociorum erit ad hunc modum, præsidens et duo seniores socii præsentium stabant ad mensam domini in capella collegii: et primo præsidens et dicti seniores scribant suffragia sua manibus propriis, sub hac forma vel consimili: 'Ego N. eligo N. in socium hujus collegii;' et deinde singuli socii præsentes vota sua similiter scribant singulatim; et in quem præsidens et major pars sociorum omnium, tam præsentium quam absentium, consenserit, pro electo habeatur. Quem sic electum Præsidens teneatur pronunciare et admittere . . . . . Qui sic electus presen-

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tetur coram communitate; et juret, se observaturum statuta et consuetudines hujus collegii, ad hunc qui sequitur modum."

Then followed the fellow's oath, which was entitled, "Juramentum sociorum, quo præstito admittantur ad totum jus et emolumentum societatis." One clause of it was as follows: "Jurabis, quod quando poteris expendere annuatim ad summam decem librarum pro termino vitæ tuæ, præter portionem istam quam habebis de collegio, statim post annum tuæ promotionis recedes ab hac societate tua, et omnibus libertatibus et emolumentis ejus, in perpetuum; nisi propræses fueris, aut unus ex quinque senioribus sociis hujus collegii."

By a statute entitled "De Vitanda Partialitate in Electione Sociorum," it was provided that there should never be two fellows or two scholars of one county, nor three fellows or three scholars of one diocese, except that of Lincoln, of which, on account of its extent, there might be three fellows at the same time, if born in different counties; an exception was made as to those counties and dioceses in which the college should have lands or possessions sufficient for the maintenance of one fellow; one fellow in addition to the number prescribed might be elected from those counties or dioceses.

Another statute, "De Lectione Statutorum," contained the following provision:

"Volumus insuper quod statuta hujus collegii sint tripartita: quorum una vera copia semper remaneat in Turri, cum sigillis et jocalibus collegii; secunda remaneat in camera præsidentis; tertia vero remaneat cathenata in Vestibulo capellæ collegii."

Lastly there was the following clause:—"De interpretatione statutorum."

"Nihil tam perfecte et absolute a quoquam tradi ac statui queat, quod versutum callidumque ingenium non possit impie et perverse interpretari, atque ad sensum longe diversum trahere. Ideo statuimus, quod nullus hujus collegii socius, immo nec præsidens ipse, præsumat quovis modo statuta hæc nostra, vel eorum unum aliquod, juxta suum ipsius sensum torquere et interpretari; sed quicquid ambigui in aliquo prædictorum statutorum posthac occurrerit, declarari sive interpretari volumus per præsidentem et majorem partem sociorum; sed tamen, quoad fieri possit, ab eisdem præsidente et sociis semper dicta statuta juxta sensum literatum et grammaticalem eorundem declarentur et interpretentur; quas interpretationes perpetuum robur et effectum sortiri volumus, et proinde ac statuta a præsidente et sociis hujus collegii observanda fore decrevimus. Neque liceat præsidenti et sociis hujus collegii quovismodo sua propria authoritate nova statuta condere, his præsentibus statutis et ordinationibus jam editis contraria et repugnantia, sub pœna incurrendi manifestum perjurium ipso facto."

On the 1st of April 1820, the office of president became vacant by the death of the Rev. Isaac Milner, D.D. The senior fellow, J. L. Hubbersty, M.D. appointed nine o'clock on the morning of Sunday, the 9th of April, for the election. All the fellows, sixteen in number, assembled in the chapel at that hour. The candidates proposed were, the Rev. W. Farish, the Rev. George Barnes, B.D., the Rev. H. Godfrey, B.D., the Rev. W. Mandell, B.D.: the two latter were amongst the five senior fellows of the college.

The senior fellow who proposed Mr Barnes, stated to the meeting that

a benefice, of which he was incumbent, was of more than sufficient value to qualify him according to the statutes. He also inquired for the qualification of Mr Mandell, who answered that he had it in his pocket. Mr Godfrey was silent as to his qualification. It was represented in some of the affidavits that he had been required to produce it, but had refused; he however denied that any inquiry was made, or any explanation asked for on the subject; and deposed that he had no reason to believe that any doubt of his being duly qualified was entertained by any of the fellows. His statement was corroborated by some of the other affidavits.

The votes being then taken, the numbers appeared to be, eight for Mr Mandell, four for Mr Godfrey, three for Mr Barnes, and one for Mr Farish. Neither candidate having a majority of the whole number of votes, two more scrutinies took place, both of which being also inconclusive, the right of election devolved upon the five seniors. Four of their votes were given in favour of Mr Godfrey; upon which the senior fellow pronounced his election in the words directed by the statute, and presented him at the communion table to the fellows as their president, and the psalm of *Te Deum* was then read.

A difference of opinion then arose among the fellows as to the period at which the declaration of conformity, required by the statutes 13 & 14 Car. 2. c. 4, s. 10, and 1 W. & M. c. 8, ought to be signed by the newly elected president. Some expressed an opinion that the signature ought to precede the oath of admission, others that the latter ceremony should take place first. The result was, that Mr Godfrey took the oath at once, and the senior fellow delivered to him the keys of the college chests and a copy of the statutes. There was a slight variation in the statements made by the affidavits as to this transaction, some representing that it was by Mr Godfrey's own choice and desire that this course was adopted, while he and some others stated that he acted only in concurrence with what appeared to be the opinion of most of those present. He immediately afterwards went to the door of the president's lodge (with the view, as it was stated, of taking possession) and left the keys there, and on the same day he sat at table in the hall, and in the combination room, in the president's seat.

The copy of the statutes, which was delivered to Mr Godfrey, was one that was usually kept in the combination room for the use of the fellows. There was another copy appropriated to the use of the master. At the time of the election it was locked up at the lodge, and could not be found. The two copies were considered to be equally authentic.

On the morning of the following day, Monday, the 10th of April, about ten or eleven o'clock, Mr Godfrey attended the vice-chancellor of the university, and there subscribed his name to the declaration of conformity in the vice-chancellor's book. He then entered upon the exercise of the office of president.

It appeared that very soon after the election, an opinion began to gain ground in the university, that it had become void from the signature to the declaration of conformity having been postponed till after the oath of admission. Mr Godfrey, on the 15th of April, repaired to London for the purpose of consulting counsel on the subject; he returned in a few days, and on the 20th he called a meeting of the fellows then in residence, in the chapel, where the following ceremony took place at his request:—He was introduced by the senior fellow to the president's seat, and installed in it by him; he then knelt down at the altar of the chapel, and the senior fellow pronounced over him the following words—"Ego, J. L. Hubber-

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sty, senior socius hujus collegii, admitto te in præsidentem hujus collegii, in nomine Patris et Filii et Spiritus Sancti." Mr Godfrey was desirous of taking the oaths of allegiance, supremacy, and abjuration at the same time; but the senior fellow declined to administer them, as being oaths that should be taken in one of his majesty's courts of record, which Mr Godfrey afterwards did.

A petition was now presented by J. King, Esq., one of the fellows of the college, praying a declaration that the office of president was vacant, and that a new election ought to take place; or if it should appear that the right of nominating or appointing to the office had devolved upon his majesty as visitor, then, that his majesty would be graciously pleased forthwith to nominate or appoint to the same. This petition alleged that Mr Godfrey was not possessed of the qualification required by the statute, and submitted that on that account, and from his not having stated his qualification at the time, the election was void; but it chiefly insisted upon the circumstance of Mr Godfrey having been admitted to the office without having previously subscribed the declaration of conformity.

In the affidavits filed in answer to this petition Mr Godfrey stated himself to be entitled to an interest in real estate exceeding 20*l.* per annum in value, and denied having ever refused to show his qualification.

Evidence was also produced for the purpose of proving that the ceremony performed in the chapel on the 20th of April, was necessary, and constituted the admission to the office, and that the subscription was therefore, in fact, made before the act of admission. It was stated that certain ceremonies, not specified in the statutes of the several colleges of the university of Cambridge, were generally in use on the admission of fellows and of masters or heads; and that on the admission of professors and readers, certain ceremonies were generally used, not specified in the statutes of the university, but without which the admission was not deemed complete; these ceremonies constituting or completing the admission were distinct from administering the oath. In Queen's College no particular form of admission was prescribed by the statutes, the word *admittere* alone being used; but it appeared that the practice was, for a fellow on his election, after subscribing the declaration of conformity, and taking the oath, to kneel down and place his hands between those of the president, who admitted him by pronouncing these words—"Præses hujus collegii, admitto te in socium perpetuum hujus collegii in nomine Patris et Filii et Spiritus Sancti." A similar form of words ("admitto te," &c. "in nomine Patris," &c.) was used upon admission to degrees.

In a book containing a copy of the statutes, formerly belonging to the Rev. T. Thwaites, a fellow of the college, a memorandum was found, believed to be in his hand-writing, and purporting to be an account of the forms for the admission of a president. It was in the following terms:

"Forms attending the election of a master not mentioned in the statutes, are as follows:—

"The books and keys being delivered, the senior fellow introduces him into his seat in chapel. He then must go and subscribe before the vice-chancellor for the time being. And after that the said senior fellow must administer to him the oaths of allegiance, &c. (which see in the master's book), and also the subscriptions then to be made before the senior fellow, who, lastly, admits him in the following form, the master kneeling:—'In nomine Dei, Filii et Spiritus Sancti, ego, senior socius hujus collegii, admitto te in præsidentem hujus collegii.'

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"N.B. He must, on some Sunday, read the morning service, and declare his assent thereto, and to the articles, before a majority of the fellows and scholars; and the fellows must sign a certificate of his having done it for the master's security."

Mr Thwaites was elected a fellow in 1751. It appeared that he was a fellow, and voted at the election of Dr Plumptre, who was chosen president in 1760. It was conjectured that the memorandum was written about the year 1760, and was a record of what passed at the admission of Dr Plumptre. The names of the successive presidents were found subscribed in the master's book agreeably to the memorandum. It was insisted that these ceremonies were amongst the "laudabiles consuetudines" of the college, which the fellows by their oaths were bound to maintain inviolate.

In addition to this, in some MS. collections relative to the history of Queen's College, prepared by Dr Plumptre, there was a passage mentioning that "Mr Herbert Palmer, was, April 11, 1644, made master by the earl of Manchester, who came in person to the college chapel, and there installed him in the master's seat, and performed the other ceremonies usual on the admission of a master."

On the other hand, some gentlemen who had been fellows in 1788, at the time of the election of Dr Milner, the late president, made affidavits. Several of them stated their belief that the only ceremonies performed at his admission were those expressly prescribed by the statutes, and that he subscribed the declaration of conformity previous to taking the oath, or having the book and keys delivered to him; one of them was positive that no ceremony of kneeling took place; one only remembered that Dr Milner was introduced to the president's seat in the chapel, and installed in it by the senior fellow.

With reference to the question, whether the subscription to the declaration should have been made on a Sunday, it appeared that in the university of Cambridge it is customary to do many public acts on that day. The congregations of the senate of the university, fixed for particular days of the month, are held, although those days fall on a Sunday, degrees conferred, and other university business transacted. It had often happened that masters and fellows had been elected on Sunday, and had signed the vice-chancellor's book on the same day.

Another petition was presented by the Rev. W. Mandell and some other of the fellows, raising a different objection to the election of Mr Godfrey. At the time of Mr Godfrey's election to a fellowship in 1803, there was already one fellow (the Rev. G. Barnes) of the county of Middlesex, of which he was himself a fellow. Mr Barnes continued till 1817. The petition insisted that the college not having property in Middlesex sufficient for the maintenance of a fellow, there could not legally be more than one fellow of that county at the same time, and that Mr Godfrey's election as fellow was therefore void. The consequence of this was, that at the election on the 9th of April, there were only fifteen persons, instead of sixteen, entitled to give votes. Out of these, eight, upon the first scrutiny, were given for Mr Mandell, constituting a majority of the whole number. He now contended, that he ought, on the result of that scrutiny, to have been declared duly elected, which the petition accordingly prayed.

With reference to this question, it appeared that from the year 1568, previous to which the college register was imperfect, down to the present time, it had been usual to have at the same time two fellows from the

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county of Middlesex or the city of London. It had sometimes happened, that in addition to these, a third fellow of that county had been elected by a dispensation from the crown; and there was found in the president's copy of the statutes a form of a petition to the king for a dispensation to elect a fellow when his county was full, which commenced by stating, "that whereas the statutes of the said college do permit no more than two persons of the county of Middlesex to be chosen fellows thereof." &c. No traces were found of the manner in which this custom had originated; but it was suggested that there was reason to believe that some of the documents of the college had been lost during the period of the civil war.

It was insisted in support of Mr Mandell's claim, that the possession of personal property to the amount of 20*l.* per annum was a sufficient qualification for the office of master to satisfy the statute. On the other hand, in several affidavits, it was stated to be the prevailing opinion, that real estate only was to be considered as forming a qualification.

A difference of opinion also existed as to the requisite amount of the qualification. The sum mentioned in the statute was 20*l.*; and the annual income, the possession of which was to disqualify a fellow, was 10*l.*: with respect to the clause of the fellows' oath imposing this restriction, an interpretation had been made in the year 1774, by the president and fellows; by which it was declared that it was to be understood in the following sense, viz. "Neminem hodie propter redditum aliquem temporalem pro termino vitæ, a societate suâ recedere teneri, nisi talis redditus summam 90 librarum exuperabit." In the year 1804, another interpretation was made, stating it to be the sense of the master and fellows that the words, "*quando poteris expendere annuatim*," &c., ought to be now interpreted afresh, on account of the decrease of the value of money and other changes of the times. Accordingly the master or president, and the major part of all the fellows present as well as absent declared, that as the interpretations above-mentioned, did proceed on the principle of a diminution in the value of money, &c. &c. in the proportion of one to nine, it will in future be equitable that the rule of practice be in proportion of one to twelve at least." Upon these interpretations, an argument was founded, that the 20*l.* mentioned in the statute as the qualification of a president should be increased in the same proportion.

Mr Wetherell and Mr Bligh for the petitioner King, contended first that Mr Godfrey was not duly elected on the ground that his supposed qualification, though called for, was not produced or stated at the election. They argued next, that this qualification was not of sufficient amount to satisfy the intention of the statutes. In consequence of the alteration of the value of money, the amount of the income which disqualifies a junior fellow has been raised from 10*l.* to 120*l.*: the same reason applies equally to the income required as a qualification for the president. To estimate the value of money at different rates in the same statutes, would be manifestly inconsistent, and would defeat the design by destroying the proportion intended to be preserved between the incomes of the president and fellows. Thus, according to the statutes, a junior fellow is not eligible to the office of president, as he is unable to hold his fellowship if in possession of property sufficient to qualify him for that office. But this part of the constitution of the college would be altered by changing the disqualification for a fellowship, without a corresponding change in the qualification for the presidency. The amount of that qualification must therefore now be taken at 240*l.* per annum.

But if Mr Godfrey was duly elected, the office became vacant in consequence of his neglecting to sign the declaration of conformity. The statutes direct the senior fellow to pronounce the election, and admit the person elected; they then go on to prescribe the ceremonies which the senior fellow is to perform: he is to administer the oath, and deliver the book of the statutes and the keys to the elected president. These directions point out the mode in which the admission is to take place. It consists in administering the oath, and delivering the book of the statutes and the keys, a form analogous to the ancient modes of symbolical delivery of possession. Nothing further is required. The whole of this ceremonial was performed on the 9th of April, immediately after the election: the admission of Mr Godfrey was therefore then complete, and he accordingly on that day took possession of the master's lodge, and entered upon the exercise of his office. He was then in full possession. It was not till the following day that he signed the declaration; the act of uniformity requires that subscription to be made at or before admission to be incumbent or have possession, and in default the office becomes vacant, as if the person were naturally dead. A subscription the day after a complete admission, and after possession taken, cannot be said to be at or before that admission; the act of receiving the admission and possession without having subscribed occasioned an immediate forfeiture.

The ceremony performed on the 20th of April was one not required by any part of the statutes, and cannot therefore be essential to admission. It appears that it did not take place on the election of the late president; there is no evidence of its ever having been practised, except a memorandum recently discovered in a private copy of the statutes: and at the time of the election none of the members of the college had any idea of such a form being either necessary or usual. It cannot, therefore, be considered as having the authority of any custom, and even if any such custom had existed, it could not vary the rules of the statutes, according to which the admission was complete on the 9th of April.

Mr Hart and Mr Montagu in support of the petition of Mr Mandell contended, that, according to the statutes, the possession of personal property to the amount of 20*l.* per annum was sufficient to qualify him for the office of president. The words "qui expendere poterit," &c. apply as well to an income derived from personal estate, as to one derived from real estate, and there is nothing from which it can be inferred that they were used in the one sense rather than in the other.

Mr Mandell was in fact himself elected on the 9th of April, the majority of the persons qualified to vote having on the first scrutiny declared in his favour. The vote given by Mr Godfrey ought to be rejected. He was elected to a fellowship under the idea that the college statutes admitted of two Middlesex fellows at the same time. The election of a second Middlesex fellow could not be authorised except by a dispensation from the crown granted for the particular occasion. But the crown had no power to grant a general and perpetual dispensation, and if it had, there is no evidence of any such dispensation, and nothing from which it can be presumed. The practice has been founded on error. There was no particular dispensation on Mr Godfrey's election. His election was therefore a nullity, and could not be confirmed by time. Even if a distinction should be made between a fellow *de facto*, and a fellow *de jure*, and if it should on that ground be held that he was competent to exercise some of

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the functions of a fellow, still this could not extend to give validity to his vote in his own favour.

They further argued, that if Mr Godfrey was considered to have been elected, the office had become vacant by his neglecting to subscribe the declaration.

Mr Horne, Mr Shadwell and Mr Garratt, for Mr Godfrey.

Although the college statutes do not authorise the election of two Middlesex fellows, it was in the power of the crown to grant a general dispensation for this purpose; and there is sufficient evidence to raise a presumption that such a dispensation must at some former period have been granted. The practice of having two fellows of that county, which has prevailed for so long a time, without any doubt having arisen until the present occasion, can only be accounted for by referring it to some legal origin. The election of Mr Godfrey, even if originally liable to any objection, ought not, after a possession of seventeen years, to be allowed to be questioned(*a*), particularly by parties who concurred in the act.

The qualification of Mr Godfrey consists of real estate, and as it exceeds 20*l.* per annum in value, it satisfies the statutes. The interpretation which has raised the disqualification of a fellow, does not apply to the qualification of the president, and therefore, whether it be or be not valid, it is not material to the present question. The statutes do not require the production of the qualification at the election, and it appears from the affidavits that it was not in fact called for.

Mr Godfrey being therefore duly elected, the next question relates to his admission. The statutes require the senior fellow "personam sic electam admittere," without specifying the particular form of admission to be observed, and then proceed to direct certain ceremonies. But the admission is something distinct from these ceremonies: this appears from its being enjoined by a distinct clause, as well as from the general usage with respect to ecclesiastical matters, in admission to degrees and to university and college offices. Thus, the admission of a clerk to a benefice is distinct from institution. Co. Litt. 343, *a*. In this case the memorandum in Mr Thwaites's book shows what the usual form of admission of a president has been. A similar form is proved to be constantly adopted on the election of fellows, though not required by the statutes, except under the general term admittantur. The usage puts a construction on that term; and the practice has become one of the "laudabiles consuetudines" of the college. The ceremony of admitting by a form of words nearly the same as that mentioned in the memorandum, is in use in other colleges, and in conferring degrees in the university.

The admission of Mr Godfrey was therefore not complete till the 20th of April, and his subscription to the declaration on the 10th, satisfied the statute of uniformity. He had not in the interval between the election and his subscription on the following day done any act in exercise of the office. The circumstance of his going to the door of the lodge, and sitting in a particular seat at dinner, did not amount to taking possession of or exercising the office.

Even if the administering the oath, and delivering the book of the statutes and keys, could be considered to constitute the admission, those ceremonies were not complete on the 9th of April, since the book delivered was not the president's book, as required by the statute.

(*a*) Rex. *v.* Dicken, 4 T. R. 282.

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Supposing, however, that Mr Godfrey was really admitted on the 9th of April, his subscription to the declaration on the following day was a reasonable compliance with the spirit and intention of the act of uniformity. The election being on a Sunday, it was not incumbent on him to offer, or on the vice chancellor, to receive his signature on that day: and the subscription took place at an early hour on the following morning.

Jan. 26.—The Lord Chancellor. Upon looking at this matter with the best attention I have been able to command, it seems to me absolutely necessary that I should hear the attorney-general. His majesty has a direct interest to contend, if he pleases so, that there is a vacancy, and that he has a right to fill it. It is not therefore necessary for me to make many observations at this stage; at the same time I will throw out a few remarks which may be of use to those who may have to submit any thing further to the court, if his majesty should be of opinion that such a course is necessary; for I apprehend that in such a case as this we are not bound down by any regular and exact forms of proceeding; but that the parties may offer to the consideration of the visitor any thing which they may think pertinent and proper, without being restrained by the length to which they may have already carried their case.

The first question to be decided is: has there been a due election of a president? Mr Mandell states that he himself was duly elected: that proposition stands on very peculiar grounds. It is said that Mr Mandell was duly elected because Mr Godfrey ought not to be considered a fellow of the college. The objection is put upon this ground:—by the statutes there must be no more than one fellow of the county of Middlesex. Now it is stated that Mr Barnes was elected in 1798 as a Middlesex fellow, and continued as such down to 1817; that Mr Godfrey was elected a Middlesex fellow in 1803; that if his election was invalid he was not a fellow, and his vote given at the election of a president was therefore invalid. It is contended on the other hand, that, independently of all that belongs to the circumstance of Mr Godfrey's being a fellow *de facto* for so many years, he ought to be considered a fellow *de jure;* and this is grounded on a proposition, that notwithstanding what is the language of the old statutes, the present constitution of the college does admit of there being two coexisting Middlesex fellows. Agreeing, as I entirely do, that no usage which cannot be shown to have had a legal origin, can ever justify a breach of the statutes, still, the question here will be (if the usage of having two Middlesex fellows be made out), whether that usage may not have a legal origin—a legal origin, I mean, to be justified by all the principles that can be applied to college statutes; and if it may, whether we are not to presume it, though it cannot at present be shown, *in scriptis verbis.*

With respect to this it was said that the crown has a right to dispense with the statutes, and I am afraid I should trench upon its powers if I denied it; for there are various instances to be cited, in which the crown has dispensed with the statutes; all of them, however, being dispensations *pro hâc vice.* But then it is contended that the same power which can give a dispensation *pro hâc vice* can give one, not only for the present occasion, but also for all times to come. That is a fair question of law, and I state it as such without giving, at present, any decided opinion on it. But supposing, that in point of law the crown could not only so dispense *pro hâc vice,* but could confer the attribute of perpetuity on such a dispensation, the question is, whether such a case ought not to be here presumed?

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I do not mean to give any definitive decision; but, supposing such a dispensation to be legal, and supposing this subsequent question to be tried by a jury, namely, whether such a general dispensation had or had not been given, I should think myself justified in saying, that there were very strong grounds for presuming that it had been given. These grounds would be fortified by a reference to what has taken place in the college, and which otherwise never could have taken place consistently with the statutes.

If the question, as to Mr Godfrey's being a fellow *de jure*, cannot be thus disposed of, it will be necessary to consider a great variety of other points, some of them of great consequence to the universities of England. It will be for consideration, whether, if a person has been elected into a fellowship, there being no statutable candidate who had better pretensions than the individual at the time, and if he has continued to exercise the office of fellow from the time of his election, you can say, that with respect to the constitution of the academical presidency, his election shall go for nothing? Another question will be, whether, in the absence of a statutable candidate at the election of a fellow, you are, at any distance of time afterwards, to say that he is a fellow *de facto*, but that while he remains in that situation he shall do no one act which a fellow *de jure* might do? And, thirdly, whether the distinction can be adopted, that he may exercise his office as *de jure* for another person's interest, but not so for himself or for his own interest?

I wish also to call the attention of those who may have to address me again, to what must, or at least may, be the consequence to other persons who have situations in this college, if I were led to consider Mr Godfrey as never having been a fellow; and whether it may not become the duty of the visitor to trace downwards, from 1803 to 1820, what has been done in this college, and to inquire whether what has been done owes its efficacy to Mr Godfrey's voice as one in a majority of votes, and how far that may operate to affect the elections of those who have subsequently been brought into the college? The extent to which this sort of inquiry may go makes it, at least, a very nice and important, if not a very difficult, matter.

If Mr Godfrey was eligible to his fellowship, Mr Mandell's qualification needs no consideration; but the objection of no disclosure of his qualification having been made, applies equally to him. It would at least be the duty of the visitor (before deciding that Mr Mandell was elected) to see either that he had shown his qualification, or that he was in fact qualified. And this would lead me to another consideration, namely, what is the nature of that qualification, and how long has he had it?

There is another consideration with regard to Mr Mandell's claim. I am told, that in April last all the fellows of the college were congregated, and all of them had taken the oath, administered with the usual solemnities, to observe the college statutes; that Mr Godfrey, who had been a fellow since 1803, was amongst them, but that no intimation was given that he was not eligible. It is suggested in Mr Mandell's petition, by himself and the other respectable gentlemen who join in it, that they were not then fully aware and sufficiently informed of the obligations of the statutes, and that the objection was not fully understood. But it is difficult to suppose that this body of gentlemen did not know what the statutes required with respect to the Middlesex fellow, or that they did not also know that there had been two Middlesex fellows from 1803 to 1817. It is the more difficult, because those who are to determine this case are, to

a certain degree, bound to impute to these gentlemen the knowledge which they ought to have had. But supposing that they had not then that knowledge which they have now, the case in this part is, I think, extremely narrow. Neither, in point of fact, was there, nor in point of possibility could there be, that objection made to Mr Godfrey's eligibility at the time of his election. Many cases, unquestionably, have occurred in which the election of one candidate has been invalid, and that of another has also been invalid, which would, however, have been valid if due notice had been given of the ineligibility of the other. Take the case of an election of a member of parliament—two gentlemen go to the hustings; the one, A., has not the legal qualification, the other, B., has. If a notice has been given that A. has no qualification, those who vote for him throw away their votes. But if notice be not given, and the majority of votes return A., B. will not be entitled to say that the election fell upon him. I think, upon this part of the case, that it would be extremely difficult, I do not say impossible, to support the petition of Mr Mandell.

We must then travel further, and inquire whether Mr Godfrey was duly elected; and upon this, supposing him capable of being elected, and taking his qualification for granted, the statute seems to leave no doubt.

We shall then have to inquire whether he was duly admitted, and whether "at or before" the time of his admission those statutable acts were done which are necessary to give and continue validity to his election. The statute says, that the senior fellow is bound to pronounce the said election, and to admit the person so elected. There can be no doubt that admission is something distinct from pronouncing him elected, and the question on that part of the statute is, in what admission consists? It is contended, that the moment he had taken the oath, and had "*a* book of the statutes and the keys" delivered to him, he was admitted. It will be for further consideration whether this is admission or not.

If Mr Godfrey's admission be taken to have been complete by the ceremonies of Sunday the 9th, then comes a very material question, namely, what is the meaning of the direction in the statute of Charles as to the time of subscription; "at or before admission?" *Before*, certainly, as it has been said, cannot mean *after;* neither can *at*, as it has also been said, mean *after*, but neither can *at* mean *before;* and on this part of the case I do think that things may be said to be done *at* the time which are done *after*, according to the ordinary sense of the word. The statute is one that must be rigidly looked at, for whatever indulgence a visitor might be disposed to show in compliance with college customs, this is to be regulated by the statute law; and I agree that mistake can avail nothing to excuse an infringement of statute law.

Now if it be said that a party may subscribe, not *before*, but *at* his admission, let us see how that can be argued. Supposing that the vice-chancellor had been present, and that it had been upon a week-day instead of a Sunday, even then the circumstance of the senior fellow saying "Magister Godfrey admitto te," &c. could not well be simultaneous with the subscription of the declaration; and therefore if he signed after he had gone into his seat to which he had been conducted by the senior fellow, it would have been subsequent to admission, that is, in one sense, *after;* in no sense, indeed, could the act of subscription be said to have taken place *at* the admission, unless the person to be admitted could so arrange as to sign at the same time with the observance of the forms. It is a very

strong construction to put upon a penal statute; and it might tend to defeat the intentions of the foundress; because, after a president has been elected, if it should happen that they cannot find the vice chancellor at home, it might be difficult to arrange matters so as to keep him legally in his office. It may be sufficient to say that you are to give such a construction to the word *at*, as shall mean and imply a reasonable time after, in one sense of the word, as regards the making of the subscription. But we cannot go so far as to say more than a reasonable time, even if we can say so much. I think Mr Hubbersty gave good advice, in suggesting to Mr Godfrey the propriety of going to the vice chancellor to see what he would do; and I am informed that it is highly probable, from what has been frequently the case, that the vice chancellor would have permitted Mr Godfrey to subscribe on the Sunday. But then it does not seem to me to be clear in point of law, that because the vice chancellor was likely to have allowed Mr Godfrey to sign on that day, that therefore he *would* have allowed it. And this question, I think, is well worthy of being argued; first, whether the vice chancellor is bound to allow a party to make his subscription on a Sunday! and if he was not bound, whether Mr Godfrey was bound to try whether he would or not; in other words, whether a man is bound by law to make a demand on Sunday, with which he on whom the demand is made is not bound to comply!

If the ceremony of the 9th of April be not an admission, and when I speak of the word admission here, it will perhaps be proper to inquire not only into the meaning of the word *admittere* in these local statutes, but also into the words "admission to be incumbent or to have possession," in the statute of Charles II., for you must consider the one as well as the other; if that, I say, be not admission, another question is, whether the subsequent admission of April the 20th is good, previous to which there was a declaration signed before the vice chancellor, which would clearly satisfy the statute? And I must be excused in saying, that with all my academical notions of what constitutes admission in colleges (independently of what belongs to the argument of this case), I should certainly not have thought that the administration of the oath of office, the delivery of the keys, &c. was a complete form of a symbolical admission, as it has been termed; but that there is yet a further form of admission to offices of this kind; a pronunciation of certain words, as "admitto te," &c. or some such words, which generally constitutes the full and actual admission.

The case was afterwards argued by the attorney-general on the part of the crown. Some additional argument also took place on the questions, whether Mr Godfrey was bound to subscribe the declaration on a Sunday, and whether, in the event of a vacancy being declared, the right of nomination would devolve upon the crown. These two points it became unnecessary to decide.

Feb. 20.—The Lord Chancellor expressed a wish to be informed by those fellows of the college who had not yet made affidavits, what were the particular forms attending their admissions.

I observe that the affidavits represent what passed with respect to the qualification very imperfectly; I have no doubt that the affidavits have been made very honestly; for I know enough of these sort of elections, to be aware that disputes often arise among those engaged in them, and that they often do not understand each other. Mr Godfrey thinks his qualifi-

cation was not called for; some of the affidavits allege that it was; and it is represented that Mr Mandell did not produce his, but that he had a paper in his pocket, which he was ready to produce in order to show of what it consisted. One question then is, whether if either or both of these fellows had a qualification, the non-manifestation, or non-proof of it, be an objection to the election. On that I have formed an opinion, which I shall not at present disclose.

The next question is, what is the nature and amount of the requisite qualification? On that also I have formed an opinion, which, subject to change from any new information, I have no objection now to deliver. As far as I know any thing of academical life, I can freely mention, that personal estate has never been considered as qualifying or disqualifying on these occasions.

As to the necessary amount of the qualification, a question arises from the interpretation, which has raised the sum that disqualifies a fellow from 10*l.* to 120*l.* Does the qualification of 20*l.* required from the master necessarily rise, in the same proportion, to 240*l.*? Now the amount of the fellow's disqualification either has, or has not, been settled by competent authority; if it has, that authority has not applied itself to the qualification of that master, and I think, therefore, I should be acting rashly, if I were to say that the master's qualification was not to be that which stands on the statutes, unchanged and unaltered.

If Mr Godfrey was duly elected, some very important questions arise as to his admission. There is much difference of statement as to the fact, whether Mr Godfrey positively refused to go to the vice chancellor's for the purpose of subscribing the declaration before his admission, or whether he was therein conforming to what appeared the general wish of the society. This is not very material, considering what the state of the law is; it comes at last to this question, what is admission?

It is to be considered, whether the taking the oath, and receiving the book of the statutes, and the keys, is admission; and I do not now enter into the question whether the book delivered was the president's copy, and whether the non-delivery of that copy is the non-delivery of the statutes of the college.

The oath prescribed for the fellows is entitled: "Juramentum sosiorum quo præstito admittantur ad totum jus et emolumentum societatis." Admittantur, be it observed, and not admittuntur. This must mean that some act is to be done, by which admission is completed. And this leads to another question, viz. as the fellows engage to observe, not only the statutes, but the *laudabiles consuetudines*, if it be a *laudabilis consuetudo*, that there shall be an admission of the master beyond the ceremonies of the 9th of April, whether they are not bound to consider that as the actual admission? I observe that some of the fellows mention that Dr Milner admitted them in a formal way, pronouncing certain words of admission; and in one affidavit it is represented that there was something very like a formal admission of Dr Milner himself.

A question then arises of very considerable importance, as it may affect interests out of the college; that is, supposing the admission to have taken place on the Sunday, whether under the words "*at or before*," the subscription was made in sufficient time? It seems to me clear, that the word *before*, being accompanied with the word *at*, it cannot be meant that the subscription is to be of necessity before. It has been argued, that if you can make it *before*, you are to make it before; but this is carrying it too

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far, for the legislator must have meant, that in some instances it might be made *at*. Does the act then mean simultaneously? That may be impossible. Does it then mean continuously? Now, I think the whole policy of the act is, that the subscription is to be made as soon as you have the capacity of making it.

To illustrate the meaning of the word *at*, Dr Johnson has been referred to, who says, that when placed before a word signifying time, it denotes the co-existence of the time with the event. But the same authority has given another meaning; *at*, he says, sometimes marks the occasion of, like *on*. Then comes a question, whether *at*, may not have that meaning here; and if so, supposing the oath to be the admission; and supposing that Mr Godfrey had gone on the Sunday to subscribe, making only the interval of the time occupied in walking from Queen's College to Downing College, the question is, whether that would not be a continuous act, and within the meaning of the word *at*. In the marriage act, it is said that the injunction is positive, but even that must be construed by reference to certain circumstances. There are churches in the metropolis, where more than twenty couples are sometimes married at one and the same time: it must happen there, that one of these couples cannot get to the register to sign, till the other nineteen have subscribed it: and yet I should say that this was a continuous act, and within the words of the statute.

This leads to another question, viz. whether the subscription (supposing it may be made *after* the admission, in the sense of the word *at* to which I have referred) must have been on the Sunday afternoon. With respect to that I feel myself under great difficulties. I have no idea that at Oxford we should on a Sunday have done any of those things which are stated to be usual at Cambridge. And if in the one university we should not hear of such a thing, I thing there is ground for arguing, that though in the other it is commonly done, it is rather permitted than required; and what cannot be positively required, it cannot be considered unreasonable to delay. Now it does appear, that as early as nine o'clock on the Monday, Mr Godfrey sent to the vice chancellor to inquire at what hour he would receive him, and that he made the subscription at a very reasonable time on that morning.

There is another question, not only of importance to this college, but of the highest interest to very many societies; and that is the following. Supposing the office to have become void from the omission of the master to sign the declaration in time, the fellows have done all that belonged to them, whether the circumstance of its being avoided in this manner does or does not make it impossible to apply the reasoning that would prevail with respect to any other vacancy; whether the vacancy happening thus, and the fellows having notice of the fact, they would not be bound to make an election within eight days, and whether the visitor would not have a right to appoint in consequence of their not having done so.

Some further affidavits were made by fellows of the college, from which it appeared, that they had all been admitted by the president with the forms mentioned above, accompanied by the words "Admitto te," &c.

The Lord Chancellor having desired to be informed of the nature of the qualifications of Mr Mandell and Mr Godfrey, they were communicated to him in his private room. That of the former gentleman consisted of personal property.

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Mr Godfrey's qualification was of the following description:—his mother had a power of appointment over the reversion in fee, expectant upon the life estates of herself and her second husband, in the undivided moiety of certain messuages, farms and lands. She by her will, dated the 5th of January 1803, appointed the undivided moiety to her sons, the Rev. T. Baker and the Rev. Henry Godfrey, and to R. O. Stone, and their heirs, upon trust, after the death of her second husband, to sell and divide the produce amongst her six children equally. Three of the children were sons, and three daughters; one of the former died in his mother's lifetime, by means of which the Rev. T. Baker became entitled to his one-sixth.

The mother died, and her husband, who survived her, died in February 1816. A partition was made of the estates under a decree in chancery, and certain farms and lands were allotted to the trustees in severalty. By a written agreement, dated in April 1816, it was agreed that the Rev. T. Baker should take a specific part of the allotted estates, in lieu of the two-sixths to which he was entitled, and from that time he held his part in severalty. Part of the residue of the estates allotted to the trustees had been sold: there remained only two farms, to the produce of which when sold, Mr Godfrey and his three sisters, two of whom were married, would be entitled. By a written agreement, dated the 29th of April 1818, between Mr Godfrey, his unmarried sister, and his two married sisters and their husbands, it was agreed that the two farms should be offered for sale, by private contract, and that not less than 8500*l.* should be taken as the price of the one, nor less than 2500*l.* for the other. Neither of them had been yet sold, nor had the stipulated prices been offered: they were at present let, and Mr Godfrey was in the receipt of one-fourth part of the rents, amounting to more than 20*l.* per annum.

It was contended against the election of Mr Godfrey, that this property was to be considered of the nature of personal estate, and could not therefore constitute a qualification.

March 20.—The Lord Chancellor prefaced his judgment by stating part of the petitions and of the college statutes, in the course of which his lordship observed that he understood his duty to be, humbly to advise his majesty, as visitor of the college, on the subject before him. But he had himself no right to the disposal of the appointment, supposing the office to be vacant. If he had, he thought he might have trusted himself with the case, without violating his duty or being influenced by any unworthy motives. I should, however, not have done so; I should have followed the example of lord Thurlow, in cases where he had the appointment to a disputed living; he would not himself decide upon the matter, but he called upon the lord chief justice of the court of king's bench, or upon the lord chief baron, to state his opinion, and upon that his lordship acted.

Upon the passage "personam sic electam admittere," the Lord Chancellor remarked, that the question again arose what it is that this word "admittere" means in statutes of this sort? There is a passage which I think I remember in Lord Coke, where he says, that admission is sometimes used as including institution; but that it is really distinct from institution and induction: and if you look at the Appendix to Gibson's Codex, which contains instruments respecting the induction, &c. of bishops, deans and archdeacons, you will, I think, agree with me in the opinion I have formed, that this word *admittere* has, in the law of England, a pe

culiar and appropriate signification, belonging to itself, as denoting an act connected with, but distinct from other acts, the whole of which make the complete investiture of persons admitted into offices of this sort. I stop for a moment to say, that admission may have more or less of ceremonial about it; it may be a mere declaration that the one person admits the other, as a bishop says to a clergyman, "Admitto te habilem," &c. or there may be more.

With reference to the direction in the statute, that the president should be presented "coram communitate collegii," his lordship said it had been asked what *communitas* means. If the statutes had been read altogether, he confessed he should have said that the communitas collegii did not mean merely the assembly of the fellows, but the assembly of the whole corporation of the college; it would be too much, however, to disturb the election on that ground after such a practice, such a consuetudo, whether it be laudabilis or not, has been acted on at different periods.

Having taken this notice of the various statutes which bear upon the matter before me, I now come to the first question for decision; whether Mr Godfrey ought or ought not to have been considered a fellow of this college? I must admit that I have found no authority in the statutes themselves, or any written document purporting to alter the ordinance by which there was to be only one fellow for the county of Middlesex. But on looking at the affidavits, particularly that of Mr Godfrey and Mr Gorham, showing the practice of having two fellows of that county to have existed for two hundred and fifty years at least, and observing the passage which states this practice to have been in a sense sanctioned by Dr Milner, and adverting to the paper containing the form of an application for a dispensation to allow a third fellow for the county of Middlesex; and yet admitting, as I fully and entirely do, that no usage can justify a violation of the statutes, I have put these questions to myself:—first, whether this usage may not be taken as evidence of some original lawful authority, whether it may not be evidence of some dispensation not now produced, but that did once exist? and, secondly, whether it be necessary, or rather fit for me to say, that all that has been done in this college for so many years has been wrong, when it might have been all right, if I take the usage to be evidence of a lawful origin? And I own that the conclusion to which I am driven is, that I cannot impute to all the former as well as to the present fellows, and to all the presidents, that, in violation of their oaths to observe the statutes, they have from age to age permitted that to obtain among them, which is now proved to be wrong.

Upon looking at another class of affidavits, I might, I think, be justified in making some further observations, but I abstain: it is sufficient for me to say, that whether Mr Godfrey was or was not entitled to vote at this election as a fellow *de facto*, I conclude from this evidence that he was a fellow *de jure*. Mr Mandell's claim to be master, therefore, falls to the ground.

March 27.—The Lord Chancellor. I proceeded so far the other day as to state my opinion upon the claim of Mr Mandell, founded upon the allegation that Mr Godfrey ought not to have been considered as a fellow. It appeared to me that according to the statutes when originally made, there could only be one Middlesex fellow. But on finding by the affidavits, that the practice of having two fellows of that county has prevailed for two centuries and a half, and that a form of applying for a dispensation to

have a third was known in the college, and considering that during that long series of years every fellow must have forgotten his oath, if the statutes have been violated; and as I apprehended the crown could dispense with the statute, and could by a general dispensation sanction the practice of having two Middlesex fellows, it appeared to me that the usage ought to be referred to a lawful origin.

It remains to consider, whether Mr Godfrey was duly elected, and if so, whether he continues to be president, or whether, under the operation of any statute of this college, or of the land, the office has become vacant? If there be a vacancy, there will yet remain another question, viz. in whom is the right of appointment?

With respect to the election, it is necessary again to refer to the statute declaring the form, and the various qualifications required in the candidates. No objection was made to any of the candidates in point of literary, moral, or religious qualifications; it was also admitted that each of them answered the description of *sacerdos*, though neither of them produced or was called upon to produce his letters of orders. I mention this as connected with an observation I shall make with respect to the last qualification required, "et qui expendere poterit annuatim ad minus viginti libras." Mr Barnes's qualification was pointed out. Mr Mandell was ready to produce what he represented as his. With respect to Mr Godfrey, there appears to have been some misunderstanding. It does not distinctly appear whether he was so called upon, as to enable any one to say that he refused to produce it or state what it was. One objection made to the election is, that his qualification was not shown. Now, I have no difficulty in saying, that it would be extremely convenient, if at these elections the qualifications were shown; but I cannot go the length of saying that the election is void, because the qualification was not produced, if it existed.

With respect to the question, whether Mr Godfrey was qualified or not, the first point to be disposed of is, whether it is made out that with reference to this last election, the person to be elected ought to have had a qualification exceeding the original "viginti libræ," in the same proportion, in which the sum which is now represented as forming the disqualification to hold a fellowship exceeds the original "decem libræ." If it be so, I do not make any improper disclosure in saying that neither Mr Mandell nor Mr Godfrey was qualified. The last interpretation of the statutes is dated in 1804; by which the master and fellows (no doubt acting on their honest apprehension of the statute "de interpretatione statutorum") have stated that by reason of the change in the value of money, the disqualification of the fellows, being "decem libræ" of the time of queen Elizabeth, should be at least 120*l.* of the present day, to keep up the proportion between the stipend of the fellows, and the sum forming the disqualification; and without entering into an inquiry whether there was a due authority for the interpretation which has thus augmented the disqualification, recollecting that it is a different question what a visitor may do as a reasonable and fair interpretation of college statutes, and what he may permit with respect to points on which the law of the land attaches, I do not apprehend that what has been done on this head by the master and fellows would be likely to be disturbed by any visitor. But none of these interpretations touches the qualification of the master. And though no one can read the statutes without seeing that it was the intention of the foundress to keep up a proportion between the incomes of the master and the fel-

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lows, so that the master might have more ample means than they; yet, in point of fact, nothing has been done either by the college or by any visitor to alter the amount of his qualification. I therefore come to this conclusion, that whatever may be fit to be done to keep up the ratio that originally subsisted, it cannot be applied to destroy an election that has taken place before any construction was put upon the statute. Whatever may be proper with reference to future elections, we cannot look back for that purpose.

The next question is one of great importance to the universities; whether a real or personal qualification is intended by the words "expendere annuatim viginti libras?" Now I have been much misinformed and misled if it be not the habit, the "consuetudo" of both universities to consider the acquisition of personal property, as not disqualifying from holding a fellowship: the consequence would naturally seem to be that you would construe property required as a qualification in the same way; and accordingly there is, I think, a great deal of evidence here to show that it has always been the understanding in this college, that both the qualification and disqualification must be of a real nature. But I do not think it necessary to decide the general question, and it has always been my practice, if possible, to avoid so doing: such a decision might involve the interests of all the colleges in both the universities. For if the question be, whether Mr Godfrey's qualification be real or personal, I think that for the purposes of this day it is real; it is not, therefore, necessary to say what would be the effect of its being personal, and I should not be acting right if I decided that question.

Mr Godfrey's qualification is of this nature. A testatrix leaves a real estate to trustees to be sold, and the produce to be divided among four persons, of whom Mr Godfrey is one. If the trustees had executed the will, and we were now discussing the effect of it in a court of equity, it would be difficult according to our modern notions to say, that it was real estate; but I have no conception that the modern doctrines of equity are to be too rigidly applied in determining what is to be considered as real property with reference to statutes framed in the time of queen Elizabeth. If nothing more had been done under this will than taking possession, the court would say that the trustees should sell it, and the legatees take the produce as personalty: each having an interest in the produce of the whole, each had a right to say that the whole should be sold. But we must consider what has been done; as to one of the parties, he has accepted for his share a portion of the estate as land, and we know that where real estate is to be converted into personal, the slightest circumstance is sufficient to reconvert it into land. The other tenants in common have agreed that there shall be a sale of the remainder of the property, if they can obtain a specified price for it, otherwise it is not to be sold, and it remains now realty, not to be converted, except upon an occasion that may never happen. There is nothing in the statutes to prevent the master, if he be qualified at the time of the election, from selling his property the next day; though certainly he ought not to think of it. However, this property is now real, it may always be so, and I am therefore of opinion that there is a real qualification vested in Mr Godfrey.

With respect to the election, there seems to be no doubt: the next point is, whether Mr Godfrey still continues master, regard being had to his admission and to the subscription required by the act of uniformity.

The first important question here is, what is the meaning of the word

admittere, used in college statutes in the time of queen Elizabeth? It is beyond doubt that it means something more than to elect, for the senior fellow is bound not only to pronounce the president elected, but to admit him. In the title of the oath to be taken by the fellows we find "juramentum sociorum, quo præstito admittantur," &c.; not admittuntur. I should have found it difficult to lay much stress on the difference between admittantur and admittuntur, if I had not perceived from the evidence that it is quite substantial; for it is a fact beyond all controversy, that after the fellow has taken the oath, he is admitted in a mode showing that the taking the oath cannot be the admission. They present themselves on their knees before the president, who says, "Ego—admitto te," &c.; and this form constantly follows the oath. There is another remarkable expression in the title of an oath to be taken by certain scholars, on the foundation of Dr Stokes, a former president. "Jusjurandum electorum scholarum antequam admittantur:" which shows that some form of admission was required after taking the oath.

We must inquire then what the form of admission of the master is subsequent to his oath. After the form of the oath, the statute proceeds thus:

"Quo facto senior socius librum statutorum clavesques cistarum quæ ad officium præsidentis pertinere noscuntur illico tradere non postponat."

It has been contended, that if the book of the statutes (it being in controversy which is that book) and the keys of the chests are delivered to the person elected, he having taken the oath, becomes thereby the admitted president. For that purpose, it would first be necessary to make out the fact, that the true book of the statutes belonging to the president, and the identical keys were delivered. It is argued on the one hand, that in the passage I have just quoted, the word quæ refers only to *claves cistarum;* on the other hand, it is contented that it refers also to the librum statutorum. I take it to be clear, from the statutes themselves, there is a book of the statutes, and that there are also keys, which in a peculiar and strict sense belong to the master; and I take it to be equally clear that that book was not delivered. No blame on that account attaches on any one, for the statute as to the manner of keeping these books does not seem to have been much observed. But speaking on the authority of the statutes, it is clear that the book in the combination-room was not the book of the master, and not the book intended to be delivered. If I were the new master, I should be very sorry that my admission should depend on having that copy put into my hands. However, I should not wish to decide the case upon a circumstance of that kind.

Mr Godfrey, being present at the election, takes the oath at the time, and receives a book of the statutes. In the affidavits there is much difference of statement as to what passed, whether his taking the oath, and going through the other ceremonies at once was his own wilful act, or whether it was insisted on by some of the fellows. On the whole, however, I think that in doing it he acted in compliance with what he thought the general wish. If that constituted admission, the question arises, whether he signed the declaration "at or before" his admission to be incumbent or to have possession. It is clear that he did not do it *before* taking the oath, and receiving the book and keys. He had not only taken the oath, but he had also gone to the lodge, and had done acts that were said to be possessory, having presided in hall as master, and if he was not master, yet acting as such. Then did he subscribe it *at* the performance of the ceremonies, and

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what is the meaning of the word *at* in the statute of uniformity? It is clear that it does mean *before;* that *at* cannot mean *after,* in certain senses of the word, is likewise clear, and yet that it cannot mean, in many cases that may be put, what is strictly cotemporaneous or simultaneous, appears to me to be likewise clear; for if he has not subscribed before admission, and neither the vice-chancellor nor his deputy is present, he cannot do it at admission in the sense of simultaneously. Then the question is, if he went *eo instanti* to the vice-chancellor or his deputy to subscribe, whether that would not be fairly within the meaning of the word *at;* it being sometimes interpreted as "on the occasion of," according to our great lexicographer?

It was then argued, that it was incumbent on Mr Godfrey to go immediately to the vice-chancellor for the purpose of subscribing, and that the circumstance of its having been a Sunday, did not relieve him from that obligation, many such acts being usually done at Cambridge on Sunday. The question, however, if it were to be determined upon this point, would be not what *may*, but what *must* be done on a Sunday; not what is permissive, but what is obligatory on that day. And if the question were not prejudiced by the general usage, I should think it more wholesome to say, that this act ought not to be done on a Sunday, than that it was necessary. But this is not the point on which I mean to decide the case, and, therefore, I desire it to be understood, that my decision leaves it open to the university of Cambridge to do as it may think fit on this subject. I give no opinion upon it.

I shall now state my view of the case, and if there be much of novelty in it, or if it be unsatisfactory, I shall not object to hear any thing further that may be suggested. The true point I apprehend is, what is, according to the true construction of the statutes, the act that is called admission.

With respect to the fellows, there is no doubt that their admission is not complete, till the president pronounces over them the words "admitto te," &c. The word admittere, in statutes framed in the time of queen Elizabeth, must have a construction put upon it according to the usage arising under the statutes in which it is made use of. There is nothing in the statutes prescribing this ceremony as to the fellows, except the word admittere, and that practice must construe the word. And, therefore, when it is contended that the statutes do not require this form, I say it is a fallacy, if they require *admission.* If the word *admittere* requires something, that act must be performed: though the author of these statutes has not said precisely what is the exact form to be observed. And this seems to me to be an answer to a communication I have received from Cambridge, in which I am told that the head of a college, at the time of his admission, did not like to go down upon his knees before a person of inferior rank. In the first place, I should say, I doubt the good sense of this, for, till he is admitted, it may be asked whether he is the superior in rank. And in the next place if the statutes require it, they furnish an answer to that sort of punctilio. If the word *admittere* requires any thing to be done, till that thing is done, the admission is not complete.

As to what the usage has been with respect to the master, the evidence is very defective. What was done when Dr Milner was elected is not known; it appears, indeed, that he was led to the president's seat, and installed in it by the senior fellow. As to the rest of what passed, the affidavits are silent: but this circumstance of his being installed in the seat, amounts to rather more than the others not recollecting what took place.

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We must then look for information further back than the late master; and I now come to that remarkable memorandum of a Mr Thwaites, which is to be found in the affidavit of Mr Gorham, and which appears in a sense to have been sanctioned by Dr Plumptre, a former master. As I have before observed, if you look at the ancient instruments, and particularly those in the Appendix to Gibson's Codex, you will find what is the legal interpretation of the word *admittere* in documents of this kind. I do not find there, that there is any difficulty about being admitted by persons of inferior rank; the bishop and the dean do not scruple to be admitted by their inferiors, nor on the other hand, does the prebendary scruple to be admitted by his superior in rank; but they all have a certain form. So it is with clergymen, the law requires the bishop to admit them by an act distinct from institution and induction; pronouncing the words "admitto te habilem," &c. Taking this along with us, and connecting it with the form of admission of fellows and scholars, and remembering, that it must mean something more than election, and that though an oath is administered to the master, yet the construction of the word *admittere* is not satisfied by any thing of that kind, as to the fellows and scholars, let us look to this affidavit. [His lordship here read the affidavit relating to the memorandum of Mr Thwaites, observing as to the forms of admission of fellows and scholars, that they were not "laudabiles consuetudines" only, but that they were something more.] I agree that this particular form is not in terms mentioned in the statutes, but if it be *admission*, then I conceive that this form is in substance prescribed by the statutes.

This memorandum may, I think, fairly be taken to be a statement of what passed at the time of Dr Plumptre's election. It does appear that in many colleges these forms are not observed. This, however, does not bear upon the argument, for if they have been observed as completing admission in this college, where admission is required, that circumstance must give the construction to that which is required. I am, therefore, disposed to think that the admission of Mr Godfrey was not complete when he subscribed before the vice-chancellor, and that his real admission was that which was made by the ceremonies of the 20th of April. I state this as my present opinion, subject to observations which I shall be happy to hear from those who may have the disposition to make them.

If I am right in this opinion, it is unnecessary to consider what would have been the effect of an admission on the Sunday, and a subscription on the following day. I should be unwilling to risk exciting mischievous disturbances with regard to this question, in a university, where I hope there will be a perfect quiet on such subjects for the future. If the admission was not complete on the Sunday, the next question is, whether it was too long delayed? and I cannot bring myself to think that it was; for every body appeared to be to a considerable degree ignorant of what was to be done; and the admission took place as soon afterwards as professional advice could be obtained.

It is not now necessary to consider two other points; namely, the meaning of the word *at* in the statute of uniformity, and whether on the supposition of this headship being vacant by the penal enactment of that statute, the nomination would be in the crown or in the fellows. It does seem to me, I own, on looking into the statutes of the 13th and 14th Charles II., and also the 15th Charles II. c. 5, and the 2d Geo. II. c. 31; that if there was not a subscription within the act of uniformity, the office was *ipso facto* void, without any necessity for a judicial sentence. I am

[Case of Queen's College.]

the rather inclined to think so, because the statute of the 15th Charles II. speaking of those cases where it had been impossible to comply with the enactment of the act of uniformity, says that if the parties subscribe within a given time they shall "be restored into and preserved in their respective deaneries, canonries, prebendaries, masterships," &c. unless such offices should have been filled up in the mean time. The object was to restore to the offices in certain circumstances, and restoration must be to something that has been lost.

With reference to the question whether the crown or the college would have the right to fill this vacancy, it is to be observed that there are subsequent statutes which, in order to give effect to the acts that vacate the office, have given the right of nominating to the crown, if those who have the right have not made a new election in a certain time. But that would not decide this, for the question would be, whether, if there was not a due election made by the fellows within eight days, the fellows have by their statutes any power of electing afterwards? It was not the fault of the fellows that he did not subscribe, but they must be taken to be conusant of the law of the land, and therefore to have known that his office was vacant as if he were naturally dead. Having such knowledge, ought they not to have proceeded within the prescribed period to a new election, or being so conusant, are they to be exempted from the consequences of the infraction of their own statutes, as well as of the law of the land?

However it is not necessary for me now to decide this, if I am right in the construction of the word admission, as received by other bodies, as recognised in this college, and as confirmed by immemorial usage. I believe I have put it in a light somewhat new, and I have therefore entered largely into the reasons of my opinion. If those who hear me see any reason to be dissatisfied with what I have said, I shall be willing to hear one counsel on each side, upon the single point of admission. If no application for that purpose be made on Saturday, you will consider my judgment to be final, that Mr Godfrey has been duly elected and admitted president of this college.

Mr Bligh stated that it was not intended to submit any further observations, and mentioned the costs of the petitions.

March 31.—The Lord Chancellor said it struck him that the proceeding was so necessary for the benefit of the college in general, that the domus ought to pay the costs.

Whereupon, as visitor in right of his majesty, I ordered all parties to attend me on the matter of both petitions on the 20th day of January last, and the said petitions coming on to be heard before me as visitor of the said college on behalf of his majesty on the 20th, &c.; I do hereby, after due consideration had of the matters contained in the said petitions and affidavits, and of the said statutes, and of all that has been stated to me by counsel as visitor as aforesaid, declare that the said Henry Godfrey is now in my judgment entitled to hold and enjoy the office of president of the said college, and all the emoluments and rights thereunto appertaining; and I therefore do not think it right to comply with the prayer of either of the said petitions; but it appears to me, nevertheless, to be fit that the costs of the petitioners, and of the said Henry Godfrey, and of his majesty's attorney-general, relating to the said petitions, be respectively paid out of the funds of the said college.

Heyn *v.* Heyn.

Jacob, 49.

Under a decree to account, made upon taking the bill *pro confesso*, against a defendant who has appeared but has not answered, he cannot attend the Master without the leave of the court, but leave to attend given, and the sequestration discharged upon payment of the costs of the contempt, and of the suit.

March 24. April 3.

THE bill in this cause was filed in Hilary term 1816, against the husband of the plaintiff and two other persons for an account of some property which she claimed under a marriage settlement. The defendant Heyn put in a demurrer, which was overruled; he shortly after went abroad without putting in his answer, and stood out all process of contempt. In Hilary term 1818, the cause was set down at the rolls, and in the same term an order was obtained for taking the bill *pro confesso* against Heyn. The cause was heard in February 1821, and a decree made according to the prayer of the bill.

The defendant had in the mean time returned from abroad, and on the second seal after Michaelmas term, he moved before the Vice-Chancellor that he might be at liberty to put in his answer forthwith, which he undertook to do, and to pay the costs occasioned by his contempt, and that all further proceedings as to the bill being taken *pro confesso* might be stayed, the defendant submitting to such decree as the court should think fit. This motion was refused with costs. The defendant soon after put in his answer, and again moved that the order for taking the bill *pro confesso* and the sequestration might be discharged, he having put in his answer, and submitting to pay all the costs occasioned by his contempt, and not to delay the hearing of the cause in its regular course. This motion was also refused with costs: and the hearing of the cause took place shortly after.

The defendant now moved that the sequestration issued against him for not putting in his answer might be discharged, he having put in his answer and tendered to the plaintiff's solicitor the costs of his contempt, and that he might be at liberty to attend the Master upon his taking the accounts directed by the decree. The defendant had tendered 35*l.* for the costs, and had offered to pay the amount if it exceeded that sum; but the plaintiff's solicitor had refused to accept the 35*l.*, or to state the amount due. The defendant had been a surgeon in the army, and was now on half-pay: it appeared that in consequence of the sequestration, a stop had been put upon his half-pay. He stated in his affidavit that he intended to remain in England.

The attorney-general, Mr Heald, and Mr Moore in support of the motion.

The sequestration having issued only for the purpose of compelling an answer, ought not to be kept on foot now after the decree has been pronounced: it is not to be used to enforce the payment of what may ultimately be found due(*a*). The sequestration even if properly subsisting

(*a*) In Maynard *v.* Pomfret, 3 Atk. 468, the bill having been taken *pro confesso*, and a decree for an account made, Lord Harwicke was of opinion, that the sequestration ought not to be dis-

cannot regularly have any operation upon his half-pay. He has put in his answer and made every effort to clear his contempt.

Mr Hart against the motion.

The answer being subsequent to the order for taking the bill *pro confesso* was a mere nullity. This is not the proper motion for discharging the sequestration ; it should have been for a reference to the master to tax the costs, and the sequestration would then continue pending the taxation. With respect to attending the Master, either he is or is not at liberty to attend ; if he is, an order is not required ; if he is not, some special case ought to be shown to entitle him to such an order ; but when he is out of contempt, it is conceived that he may attend as of course.

The Lord Chancellor. I cannot blame the plaintiff's solicitor for not accepting the costs tendered, as it was not clear what costs were to be paid. With respect to the answer, if it was put in after the order for taking the bill *pro confesso*, it certainly ought not to be noticed.

The question appears to me to be, what costs are to be paid in order to let him in before the Master. For I apprehend that when the bill is taken *pro confesso*, the defendant is not at liberty to go before the Master without an order; but the accounts are to be taken *ex parte*, and they may charge him with whatever they can. There was a case of which Mr Crofts reminds me, about six years ago, in which I held that the defendant must pay all the costs, for the decree is altogether against him ; my apprehension is, that after suffering the cause to go on till a decree is made *pro confesso*, he cannot be relieved, and permitted to come in as a party to the account for his own benefit, except on paying all the costs, and on a special application. And I think that there is a necessity for such an order.

If you mean to move to discharge the sequestration so far as it affects the half pay, as fixed on a subject to which it will not apply, particularly as being before a decree, that involves the consideration of what was said in Tothill long ago, as to what a sequestration will attach on, and what very learned persons in later times have said as to what it will not attach on ; attending to the distinction between the case, where it is before a decree, and where after a decree for a duty(*a*).

April 3.—The Lord Chancellor. I take the case here to be this. The defendant was served and appeared, not absconding to avoid service, but he did not answer ; a sequestration issued, and a decree has been made to account. The question now is, if he is to be permitted to attend the Master (and it would be a strong thing to say that he should not), whether he can have the sequestration taken off, and upon what terms ? Upon some terms I think he must be permitted to come in, but it would seem to be justice that he should inform the court how much he is indebted to the plaintiff. He cannot put in an answer now to vary the decree, and the sequestration is merely for want of an answer, not as if it was for payment of money ; it is not therefore necessary now. If instead of operating so as to put you in possession of a decree, it had induced him to put in an answer, it must then have been discharged without reference to subsequent proceedings.

charged on payment of costs, but that it should be kept on foot as a security to the plaintiff for the defendant's appearing before the Master to take the account.

(*a*) See Lakes *v.* Meares, Toth. 175. Simmonds *v.* Lord Kinnaird, 4 Ves. 735. Francklyn *v.* Colhoun, 3 Swan. 276. M'Carthy *v.* Goold, 1 Ball & Bea. 387.

[Heyn v. Heyn.]

Mr Hart suggested, that the defendant ought to be required to give security for payment of what might be found due.

The Lord Chancellor thought that would be going too far; for if he had answered, the plaintiff could only have taken a decree for an account; and as his not answering could not put her in a better situation, she ought not, on that account, to have a larger demand against him by virtue of the sequestration. It was to be observed, however, that the answer might have enabled the plaintiff to take a decree for payment of a particular sum, and that might make it a question, whether the court ought not to call on him to say what he owed; to state how much, if he had put in his answer, he would have admitted to be due.

His lordship concluded with saying, that the defendant ought to pay all the costs of the suit up to the present time; for if the answer had been put in, non constat, that a decree to account might not have been made against him with costs, and he was not by being guilty of a contempt, to have the benefit of a decree which he might possibly not have obtained if he had put in his answer.

Whereupon, and upon hearing, &c., and upon the defendant paying to the plaintiff the costs of the suit to this time, including the costs of the contempt, and of this application, to be taxed, &c. His lordship doth order, that the sequestration be discharged; and it is ordered, that the defendant be at liberty to go before the Master in taking the accounts directed by the decree. And his lordship doth reserve the consideration of subsequent costs.

Reg. Lib. A. 1220. fo. 854.

Ex parte Chasteney.

Jacob, 56.

Semble.—Infant trustee for sale is not within the stat. 7 Ann. c. 19, though the persons entitled to the produce of the sale are adult and join in the petition.

Rolls.—April 10.

THIS was a petition for a conveyance by an infant trustee. The Master had reported the infant not to be a trustee within the statute; the circumstances were as follows:—R. Chasteney devised the estate in question to trustees, upon trust after the marriage of his wife, or her decease, to sell and divide the produce of the sale amongst his children. The children were now of age, and having agreed for a sale of the estate, desired the conveyance to be made to the purchaser. By the death of the surviving trustee the legal estate had devolved upon his infant heir.

Mr Pepys, in support of the petition, submitted, that though a trust, coupled with a power of sale, is not in general considered to be within the statute, yet an exception was understood to exist where the parties beneficially entitled being adult were competent to elect, either to take it as land or to have it sold, and the trustee has, in consequence, no discretion

[Ex parte Chasteney.]

in the exercise of his power. He referred to Preston on Abstracts, vol. i. p. 320(*a*).

The MASTER of the ROLLS observed, that if the will were taken by itself, without knowing who the cestui que trusts were, the case was not within the statute; and he doubted whether the fact that they were competent to consent could make a difference. He would not make the order, unless some authority could be found for it(*b*).

The Vauxhall Bridge Company *v.* The Earl of Spencer and others.

Jacob, 64.

Securities given to persons who would be prejudiced by the passing of a private bill in parliament, in consideration of their withdrawing their opposition to it, are not illegal.

April 11.

THIS case is reported upon the argument of the demurrer in 2 Madd. 356. After the demurrer was overruled the answers were put in, and witnesses examined; the material parts of the statement in the bill were proved, excepting the circumstance of the arrangement in question having been concealed or agreed to be concealed from the legislature, which was denied by the answers, and as to which the evidence was contradictory.

By the second section of the act it was provided that the sums of money to be raised by the contributions of the proprietors should be applied in the first place in discharging the expenses of obtaining and passing the act, and of the surveys, plans, and estimates, and other incidental expenses relating thereto; and then in completing the bridge, and otherwise in carrying the act into execution. By another section, the tolls were to be applied in repairing, lighting, and watching the bridge and the other expenses of the act, and the interests of moneys borrowed on mortgage; the surplus to be divided among the proprietors till it should amount to ten per cent per annum on their shares; the excess above that amount was to be invested in the funds, till it should accumulate to a sum sufficient to yield ten per cent per annum on the shares, when it was to be divided among the proprietors, who were then to cease from receiving any proportion of the tolls; from that time the tolls were to accumulate until a sufficient sum should be raised to pay off the subsisting debts, and to provide permanently for the expenses of repairs, lighting and watching; they were then to cease altogether.

(*a*) "Nor does it (the statute) extend to any case in which there are trusts to be performed, requiring a discretion on the part of the infant; but in modern practice the latter rule has been relaxed, for if all the persons beneficially interested under the trusts to be performed are adult and free from disabilities, and will petition the court for a conveyance to their nominee, the court will treat the infant as a mortgagee or trustee within the statute."

(*b*) The late statute 6 Geo. 4, c. 74, s. 10, extends to cases where the trustee has some duty to perform, or has some beneficial interest, authorizing in such cases a conveyance or transfer to new trustees duly appointed.

[The Vauxhall Bridge Company *v.* The Earl of Spencer and others.]

The cause was heard by the Vice-Chancellor on the 8th of December 1820, when it was decreed that the bill should be retained for a year, and an action was to be brought by the obligees in the bond, which the plaintiffs in equity were to be at liberty to defend(*a*). From this decree the plaintiffs appealed, and moved to stay proceedings in an action which had been commenced pursuant to the decree.

Mr Shadwell and Mr Loraine in support of the motion, contended that the illegality of the bonds was sufficiently apparent to warrant the court in granting relief at once, without resorting to an action.

Mr Hart, on the other side.

The transaction, which is represented to have been a fraud upon the legislature, was an agreement by which the proprietors of Battersea Bridge were to receive a compensation for the diminution of their tolls consequent upon the erection of a new bridge. They would otherwise have urged the injury to their private interests as a reason against the passing of the act; but on being indemnified they relinquished their opposition. It was therefore nothing more than the compromise of a private right involved in a private act of parliament; the public were in no way interested in it. Claims of this kind occurring in the progress of private acts, are frequently settled by the parties without any objection being made. It is not proved that concealment was practiced, nor does it appear to have been that kind of agreement which it was necessary to conceal. Another objection taken was, that the act did not authorize the application of the funds of the Vauxhall Bridge Company to the payment of these sums; the Vice-Chancellor, however, was of opinion that it might be included among the incidental expenses allowed in the second section. But that question is not material, for the proprietors of Battersea Bridge contracted with the obligors only, from whom they were to receive the money, and it is of no consequence to them whence it may have been supplied.

Mr Shadwell, in reply.

It was agreed that this transaction should be concealed, to avoid encountering the scruples of some members of the legislature; and whether it was an imposition upon the whole house, or upon the committee to whom the consideration of the bill was entrusted, or upon some of the individuals composing it, it is equally to be discouraged. The agreement is not to be considered in the same way as if the opposition of the proprietors of Battersea Bridge had been bought off by payment of a sum of money, for the payment was postponed till the passing of the act, and was intended to be made by means of the funds which the act was to put into the power of the company to be erected by it, while the act at the same time provided for the manner in which those funds were to be applied. The proprietors are prejudiced by this misapplication, and the public also, inasmuch as it will prolong the period during which tolls are to be payable. If it be said that the money was not expressly agreed to be raised out of the funds of the future company, still the bonds were entered into with the intention that the company should be bound in honour to discharge them, and they, considering themselves thus bound, have misapplied their funds contrary to the act; this error we now seek to have rectified.

The Lord Chancellor. In the view I take of the case, it will not be an obstacle to the plaintiffs that they do not come with clean hands, for it

(*a*) Reg. Lib. B. 1820. fo. 265.

[The Vauxhall Bridge Company v. The Earl of Spencer and others.]

is settled, that if a transaction be objectionable on grounds of public policy, the parties to it may be relieved; the relief not being given for their sake, but for the sake of the public. Thus it is in the case of marriage brocage bonds. The principle was much discussed in the case of Neville *v.* Wilkinson(*a*), where Mr Neville being about to marry, inquiry was made by the lady's father to what extent he was indebted. Wilkinson, who was applied to at the desire of Neville, concealed a demand which he had against him: after the marriage he attempted to recover it, and a bill was filed to restrain him. I remember arguing it with obstinacy, but lord Thurlow thought that having made a misrepresentation, a court of equity must hold him to it, and that although the plaintiff was a *particeps criminis:* so it was held in the case of Shirley *v.* Ferrers(*b*), in the exchequer.

If I understand the circumstances, there was a proposition to build this bridge at Vauxhall: the proprietors of Battersea Bridge objected, as their tolls would be diminished; and no one can say that there was any thing fraudulent in their doing what they could to prevent the completion of this project of building another bridge near theirs. It seems that it was at first agreed that some remuneration should be given them, which was to be secured to them by the act; but they were frightened by something that fell from some member of the committee, and imagined that scruples would be entertained about it. They then determined not to ask for any thing in the act, but they say, if you will secure to us an adequate remuneration in another way, we will agree to make no opposition to your bill. It is argued that this was a fraud upon the legislature, but I think it would be going a great way to say so, for *non constat*, if it had been pushed to the extent of taking the opinion of the house, that it might not have passed the bill in its former shape. It cannot be said that the agreement is contrary to legislative policy, because one member of the committee makes an objection which is not sanctioned or known by the house at large. Indeed such things are constantly done, and with the knowledge of the house; for they are in the habit of saying, with respect to these private acts, that though they will not of themselves pass them into laws, yet they will if the parties can agree; and matters sometimes are permitted to stand over to give an opportunity of coming to a settlement.

It is then said, that the money was to be paid out of the funds of the Vauxhall Bridge Company, which by the act were devoted to other purposes. The proprietors of Battersea Bridge, however, say that they have nothing to do with the funds of the company; that they have contracted with a number of independent persons, to whom they look for the payment of the bonds; and if the obligors agree with the company to pay the bonds with their money, what have the obligees to do with that, unless by antecedent contract? They had no demand in law or equity against the company. If then the Vauxhall proprietors choose to sanction what the legislature has not directed, namely, the indemnifying the persons who have become obligors in the bonds, that is one thing: if they have not, then the individual officers who have paid the money over in discharge of the bonds ought not to have paid it, and may now be called on to pay it back; as between them and the company, the money must be considered as being still in their hands. If the transaction is to be considered merely as between the obligors and the obligees, the latter not refusing the money from whatever hands it came, but not entangling themselves in any contracts

(*a*) 1 Bro. C. C. 543.

(*b*) Cited 11 Ves. 536.

between the obligors and the company, then the obligees would not be affected by those contracts. But if so, still the case depends upon the validity of the bonds; for I think the Vauxhall Bridge Company may with propriety say, if the money was paid in consequence of an arrangement for the discharge of the bonds, and if the bonds were bad, that then it may be called back. When the cause was heard by the Vice-Chancellor, he did that which he was not bound to do; for he certainly had jurisdiction, and might have decided upon the validity of the bonds. But he directed that to be tried at law, where all the objections may be raised upon the pleadings in the same manner as here; and considering that in matters of this nature, both courts of law and equity have jurisdiction exercised upon the same principles, I do not see any occasion to vary the decree.

The bill was afterwards dismissed by consent.
Reg. Lib. B. 1820. fo. 967.

Coffin *v.* Coffin.

Jacob, 70.

Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds. *Semble*,—Usual injunction in cases of equitable waste not extended to trees which protect the premises from the effect of the sea.

April 14.

THE defendant J. P. Coffin was tenant for life, without impeachment of waste, of a mansion-house and estate, situate on the coast of Devonshire. The plaintiffs were R. P. Coffin the elder, who was tenant for life in remainder, and his son R. P. Coffin the younger, who was tenant in tail-male in remainder, expectant on the death of R. P. Coffin the elder. The defendant J. P. Coffin had assigned his life interest to one Rowe (who was also a defendant) in trust for his creditors, and Rowe was about to fell timber. He had given the plaintiffs a notice to that effect; and, as was stated, had pointed out some ornamental timber around the house, as part of what was intended to be cut. The bill stating these facts, prayed an injunction; and on the 6th of December 1820, an injunction was obtained upon motion *ex parte* before the Vice-Chancellor, restraining the defendants from any waste, spoil, or destruction, in or about the mansion-house; and from cutting down any timber or other trees growing upon the estate, which were planted or left growing there for the protection or shelter of the mansion-house, or which grew in lines, avenues, walks, vistas, or otherwise, for the shelter or ornament of the said house, or of the gardens, orchards, or pleasure-grounds thereunto belonging, or which in any manner protected the same from the effects of the sea; and also from cutting down any timber or other trees, except at seasonable times and in a husband-like manner, and likewise from cutting saplings and young trees, not fit to be cut for the purposes of timber(*a*).

Affidavits were filed on the part of the defendants, denying any intention

(*a*) Reg. Lib. A. 1820. fo. 115.

of felling the ornamental timber ; other affidavits were filed on the part of the plaintiffs, for the purpose of showing what part of the timber was of that description ; and the defendants now moved to dissolve the injunction. A similar motion had previously been made before the Vice-Chancellor(*a*).

Mr Trower and Mr Raithby, for the defendants.
Mr Horne and Mr Parker, for the plaintiffs.

The Lord Chancellor. The court does not protect timber, because it is ornamental, but it protects it if it was planted for ornament, whether it is or is not ornamental. And, therefore, most of the affidavits which have been filed do not apply, showing only that these trees are ornamental ; it must be shown that they were planted or left standing for the purpose of ornament. I see that in a case before lord Hardwicke, of which I have a note, he confined it in that manner(*b*), and he even carried it so far, as to restrain a man from cutting down trees that he had planted himself.

The court grants injunctions against waste, when it is done only in a slight degree, or when threatened. The injunction here went too far : nothing was done by the defendants but sending the notice ; which, if Rowe really pointed out the ornamental timber, admits the construction put upon it, of an intention to cut it down. But supposing that to be made out, was it right to grant an injunction as to the other kinds of waste ? It may be said, that if he commits one act of waste, he may be suspected of being about to commit others. But we ought to be careful about this, for with respect to growing timber, the court does not expect a tenant for life to let it grow so long as a tenant in fee might find it his interest to do. And the court never grants injunctions on the principle that they will do no harm to the defendant, if he does not intend to commit the act in question : but if there be no ground for the injunction, it will not support it.

In one respect, the injunction certainly goes too far. I mean in what it says about protecting the premises from the effects of the sea. I cannot understand how that came to be inserted.

The parties afterwards, at the suggestion of his lordship, agreed upon a reference to determine what part of the timber was fit to be cut.

(*a*) 6 Mad. 17.

(*b*) One of the first cases in which the principle of equitable waste was applied to timber was Lawley v. Lawley, in 1717. The injunction was in terms similar to those used in Packington's case, 3 Atk. 215, restraining the defendants from cutting down or felling any trees on the premises, that were for the ornament or shelter of the said capital messuage. Reg. Lib. B. 1717. fo. 41. A commission afterwards went, by consent, to determine which of the trees were proper to be cut down, and which to be preserved for the ornament or shelter of the house. Reg. Lib. B. 1717. fo. 178. On its return, the injunction was continued during the defendant's life, as to the trees certified not to be fit for cutting. Reg. Lib. B. 1717. fo. 386.

Humphreys *v.* Hollis. Down *v.* Hollis.

Jacob, 73.

A bill against several defendants being retained, with liberty for the plaintiff to bring an action against one of the defendants, the trial may take place during an abatement occasioned by the death of one of the other defendants, if the decree does not direct them to attend it. On the death of a defendant, against whom the bill seeks to set aside a contract entered into by him for the sale of his wife's estate, it is regular to revive against his personal representative, without making his wife a party.

To a bill founded on a contract, the parties to the contract are, in general, the only necessary parties.

Quære. A husband agrees to sell his wife's estate and dies. Whether the wife can enforce the contract against the purchaser.

Feb. 8. April 2, 16.

THIS was a bill filed for the purpose of having an agreement, entered into by the plaintiff for the purchase of an estate, delivered up to be cancelled, on the ground of fraud. It stated, that the plaintiff had been drawn in by false representations in the particulars of sale; and that at the auction, at which he became the purchaser, puffers were employed, who raised the price much beyond the real value. The defendants were G. Hollis, J. Wilkins, C. Vaughan and E. L. Case, who were the vendors, and the auctioneer, and the holder of a bill of exchange that had been given for part of the deposit. By the answer of Wilkins, it appeared that he was seised in right of his wife, of a share of the estate. The defendant Hollis had conducted the sale on behalf of himself and the other vendors. Humphreys having become bankrupt, the suit was continued by his assignees.

On the hearing, it was ordered that the bill should be retained for a year, and the plaintiff was to be at liberty to bring an action against the defendant Hollis for recovery of the deposit (which had been paid into court, but which he was to admit to be in his hands), reserving further directions. The action was accordingly brought, and a verdict found for the plaintiff. In May 1819, between the decree and the trial, the defendant Wilkins died; some time after the trial, a bill of revivor was filed against his executor, and an order to revive obtained.

The cause now came on for further directions before the Lord Chief Baron, and Masters Harvey and Stephen, sitting for the Master of the Rolls. Two objections were taken on the part of the defendants:—First, that the action had been tried during the abatement occasioned by the death of Wilkins:—Secondly, that the bill of revivor had been filed against the executor of Wilkins, instead of his widow, the owner of the estate.

Mr Horne, Mr Treslove, and Mr Blake, for the defendants.
Mr Roupell and Mr Lynch, for the plaintiffs.

The Lord Chief Baron expressed his opinion upon the first point to be, that as the action was to be brought against Hollis, without any direction being given for the other defendants to have liberty to attend the trial, it had been properly tried according to the order of the court.

His lordship finding afterwards as the cause proceeded, that it had, in its former stages, been discussed before the Master of the Rolls, desired that it should stand over, to be heard before his Honour.

[Humphreys *v.* Hollis. Down *v.* Hollis.]

April 2.—The cause now coming on again, it was argued on the part of the defendants, that Mrs Wilkins being entitled as tenant in common to a share of the estate, she was a necessary party, as she might adopt the contract, insist upon the performance of it, and claim her share of the deposit, which had been paid into court. The whole interest is now in her, whether the property is or is not to be considered as converted. If it be real estate, it is hers in fee simple; if it be personal, it is her chose in action, not reduced into possession, and therefore it has survived to her. The executor has no interest; as against him the suit is revived for costs only.

On the other side it was said, that the objection of the want of Mrs Wilkins as a party, might equally have been taken at the hearing. The bill charges the defendants with a fraud; for which they, who alone were implicated in it, must be personally responsible. It does not appear that the wife was concerned in it. Wilkins, in his answer, does not state that she was a party to the contract, or that he entered into it on her behalf. A contract thus made during her coverture could not be enforced against her now; and it follows, that from the want of mutuality, she could not enforce it; she has, therefore, no interest in it.

April 16.—The Master of the Rolls (after stating the facts).

The only question made was, whether there is not a defect of parties. It is said, that as one fourth part of the estate which is the subject of this contract, belongs to Mrs Wilkins, she has a right to interpose, and insist on the validity of the contract; and that, therefore, the court ought not to dispose of the deposit, till she has had an opportunity of trying it.

On this point I wished to look at the pleadings, to see how the case is put; and on perusing them, I think it clear, that she is not a necessary party. In general, in a bill founded on a contract, it is only necessary to make those persons parties, who are parties to the contract. Here Wilkins did not contract on behalf of his wife; and if he had, unless she had in some manner bound herself, it would not be her contract. It was, at most, only an engagement by him that she should concur; and it is not necessary to enter into the consideration of the cases on the question, whether the court will compel the husband to procure the wife to convey; for by this contract, he takes upon himself to dispose of it, as if it were his own. It was his contract, and he alone was bound.

As the suit was circumstanced in May 1819, when Wilkins died, his death had in substance, at that time, no effect on the proceedings, for Hollis was the only defendant in the action, and this court had nothing to do till it came back after the trial; and it was, therefore, sufficient to revive when it came back. In the interim, the court had, with the concurrence of all parties, committed the defence to Hollis. The defendants knew of Wilkins's death, but made no objection; in substance, it would make no difference in the merits.

It is clear, that Wilkins's wife could not be affected by the contract; but it is argued, that she might adopt it, and claim to have it performed; to which the answer is, that she has not attempted so to do; and it is, therefore, not necessary to decide whether she could or not. If she were made a party, she might disclaim, and the bill must then be dismissed as against her with costs. Why then put the plaintiffs to that peril, particularly when the contract is of this nature? No doubt she would rather keep the estate, than involve herself in the consequences of a contract found to be

fraudulent and void. It is enough, however, to say, that her husband has been dead since May 1819, and she has taken no step to affirm the contract. I am clearly of opinion that the objection is not good. The decree must be for the contract to be delivered up to be cancelled, the deposit to be returned, and the costs to be paid by the defendants.

Reg. Lib. A. 1820, fo. 1189.

Beer *v.* Ward. Ward *v.* Beer.

Jacob, 77.

Semble, Motion to restrain a solicitor from giving evidence of confidential matters, refused, the propriety of his being examined being left to the consideration of the court before which he might appear as a witness.

A solicitor who has been discharged, may upon proof of misconduct be restrained from communicating information that came to him confidentially from his client.

April 17.

THE defendant Ward had been for some years the committee of W. Cotton, a lunatic, who died in November 1819, leaving three sisters and the grand-daughters of a deceased sister, who were the plaintiffs in the original suit. The lunatic was tenant for life of a considerable real estate; the ultimate remainder of which was limited to his father in fee; on his death, the remainder falling into possession, the estate was claimed by the plaintiffs, as co-heirs at law to the lunatic, who was heir to his father. The plaintiffs had been treated as the co-heirs and next of kin of the lunatic, in the Master's reports, and other proceedings in the lunacy.

Shortly after the lunatic's death, the plaintiffs applied for letters of administration of his personal estate, when a caveat was entered on the part of the crown, alleging that the lunatic was illegitimate. At the same time a claim to the real estate was made by the defendant Ward; he alleged that the father and mother of the lunatic had married subsequently to his birth, but previously to that of his brother E. R. Cotton; that the ultimate remainder had, therefore, vested in E. R. Cotton, under whose will he claimed. The above suits arose out of these opposite claims; and a suit for the administration was depending in the ecclesiastical court, between the plaintiffs and the crown.

A motion was now made on the part of the plaintiffs in the original suit, that the defendant's solicitor, and his clerk might be restrained from disclosing (by the giving of evidence in judicial proceedings or otherwise) any facts, circumstances, or matters, relating to or concerning the rights and interests of the plaintiffs, which came to the knowledge of the solicitor, while he acted as the clerk or assistant to G. L. V., deceased, who was the solicitor for several of the plaintiffs, or while he had himself acted as solicitor for the plaintiffs or any of them, and particularly in respect of the rights and interests alluded to by him in a letter of the 12th of November 1819, to the plaintiff Rebecca Beer; or which came to the knowledge of the clerk, while employed as clerk to the solicitor, or when acting as agent for the plaintiffs.

[Beer *v.* Ward. Ward *v.* Beer.]

By the affidavit in support of the motion, it appeared that the defendant's solicitor had, for a period of more than twenty years, been employed by two of the plaintiffs to attend to their interests in the lunacy, and he had previously been clerk to their former solicitor. Shortly after the lunatic's death, the plaintiffs having determined to employ another solicitor, in the business relating to the distribution of the property, informed him of their intention; upon which he wrote to the plaintiff Rebecca Beer, a letter expressing his concern at their confidence being withdrawn; he added, that at a critical moment like the present, the preservation of their rights required the most extraordinary care and attention, and, above all, to be kept from the knowledge and interference of strangers; he recommended them to pause before they took a step that might be regarded in an offensive light, and tend to lay open matters that ought not to extend beyond the present circle. The plaintiffs, however, persevered in their intention. The affidavit then stated, that the caveat on the part of the crown was entered (as the deponent believed) in consequence of statements and representations made by the defendant's solicitor to the king's procurator-general; and that in order to support the caveat, he had given up to the officers of the crown, documents and papers, some of which had come to his hands as solicitor for the plaintiffs; and was otherwise actively engaged in assisting the procurator-general in impugning the legitimacy of the lunatic: he and his clerk were about to be examined as witnesses, in the suit in the ecclesiastical court.

Mr Hart and Mr Buck in support of the motion.

This is an application by clients, to prevent their late solicitor from disclosing information acquired through the confidence reposed in him by them; resting on the same principles with the decision in Cholmondeley *v.* Clinton(*a*), although as the plaintiffs themselves discharged this gentleman, they cannot as in that case carry it to the extent of preventing his being employed for the other party. They only desire that the knowledge gained in their confidential service, at their expense, may not be employed against them. That knowledge is their property, and it is their privilege that it should not be communicated; the solicitor cannot at any time divulge it, either against them, or in an action to which they are not parties. King *v.* Withers(*b*). This secrecy being the duty of the solicitor, the court will enforce it by the exercise of its preventive jurisdiction; its general control over its officer authorises it to compel him to do that which is his duty.

The Lord Chancellor. He might be punished for not doing his duty; but can I compel him to do it? With respect to many facts that come to his knowledge as solicitor, if he were examined as a witness, the court would insist upon his deposing to them; and if I ordered him not to disclose any thing that he learnt in that manner, the court of King's Bench might perhaps commit him for refusing. I think, therefore, that I cannot make this sweeping order. There cannot be irreparable injury, for it would be the duty of any court to stop him if he was about to disclose confidential matters. If he has received papers or deeds from his client, no doubt the court would prevent him from delivering them to any one but his client. But there is a great difference in the modes of making such an order; for though I might order him to deliver them to his client, which would have

(*a*) 19 Ves. 261. Coop. 80. (*b*) 2 Campb. 578.

the effect of preventing him from giving them in evidence, yet I doubt whether I should compel him, while they are in his hands, not to give them in evidence; for the propriety of that must depend on all the circumstances. If he voluntarily makes communications of what has come to his knowledge confidentially, it is a great breach of his duty; but there is a difference between ordering him not to communicate to an individual, and ordering him not to communicate to a court of justice by giving evidence; for the court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege; or that if he does not, the court will make him claim it. If it is desired that he should be restrained from making communications to individuals, you must show me what has been done; for I could not interfere to restrain, in this case, any more than in cases of waste, unless something has been done which ought not to have been done.

Mr Wetherell, Mr Shadwell, and Mr Pepys, against the motion, contended that no facts were stated to warrant it; independently of which it was quite unnecessary as far as it regarded judicial examinations, as the court before which the examination might take place would confine it within those limits, which a due regard to the confidence of solicitor and client required. With respect to other disclosures by private communications, the court would not make an order to prevent them, as it would be impossible to execute it. An infraction of it could never be detected. The notice of motion in Cholmondeley *v.* Clinton, extended to restrain the communication of information; but the point does not appear to have been noticed in the argument or judgment; and no order was ever drawn up.

Mr Hart, in reply.

The plaintiffs having found that the consequence of their transferring their employment from this gentleman was, that, through his agency, an adverse claim is set up, agreeably to the intimation contained in his letters; and some of their papers having been given up to the opposite party, they are fully borne out in this application. If it cannot be granted in the unqualified terms in which it is couched, it may be limited so as not to prevent him from giving any evidence which is proper. In the ecclesiastical courts, and this court, where the examination is private, there is no opportunity for the interposition of the judge to prevent improper disclosures, and if the solicitor does not himself object, the mischief is irremediable. If the order compelled him not to give evidence without insisting on his client's privilege, it would answer the purpose; and it should also prevent those communications which, though not made in the shape of evidence, may be equally injurious by leading to the evidence of others.

The Lord Chancellor. There is an objection to the form of this proceeding, which, if it were insisted on, could not, I apprehend, be repelled. The motion, if in other respects right, could not be made in a cause. Being an application to the general jurisdiction of the court over its officers, it ought to be in the matter of the complainant; you cannot move in the cause for such an injunction as this. But I have no doubt that the gentleman against whom the motion is directed would not desire to avail himself of this objection.

In Cholmondeley *v.* Clinton I had great difficulty to know how to act, and I took the opinions of the judges. There the gentleman who had been concerned for Lord Clinton discharged himself and went over to the other

[Beer v. Ward. Ward v. Beer.]

side. It appeared to me, and to all the judges, that nothing could be more dangerous than to permit a solicitor employed by A. in a cause between him and B., to leave A. while still willing to retain him, and enter into the service of B.

It is unquestionably true, as has been observed, that the right of the solicitor to refuse to answer when he can only answer by a breach of confidence, is not the privilege of the solicitor, but of the client: if he answered, knowing what he was doing, it would be a great offence. But I do not see my way to grant a motion so extensive as this. It desires of me that I will not permit this gentleman to give evidence in other courts; which is, that I will not trust them with the consideration of whether he ought or ought not to answer a question to be put to him, as to which question I know nothing, and when I cannot, therefore, say what my opinion might be as to the propriety of the question being answered.

It is stated that he has given up papers placed in his hands by the plaintiffs: and if a motion were made on that subject, it would be quite a different case from that now before me. If the papers came to his hands confidentially, he could not give them to any one but his client, and if a motion were brought forward properly, he might, perhaps, be ordered to give them up again. It would be a different question, whether I could say, if he could not be compelled to give them up to the client, that no court of justice should compel him to give them in evidence. That must depend on other circumstances(*a*).

Motion refused, without costs.

Perry *v.* Silvester.

Jacob, 83.

When after depositions have been suppressed for irregularity, a re-examination is permitted, all the same witnesses must be examined and cross-examined.

April 30

THE plaintiffs in this cause having examined witnesses, and having also cross-examined some of the defendant's witnesses, it was afterwards found that the interrogatories were erroneously entitled, upon which the depositions were suppressed; and it was ordered that the plaintiffs should be at liberty to exhibit the same interrogatories for the examination of the same witnesses, and the same interrogatories for the cross-examination of the same witnesses for the defendant, as those upon which the same several witnesses had already been examined and cross-examined by the plaintiffs. Under this order the plaintiffs proceeded to examine their own witnesses only, and obtained an order on motion before the Vice-Chancellor for the publication of these depositions, on the terms of their consenting to the defendant's reading, if he should think fit, the depositions taken on the former cross-examination(*b*).

(*a*) See Belchier *v.* Thorp, *post*. (*b*) Reg. Lib. B. 1820, fo. 296.

[Perry *v.* Silvester.]

Mr Agar, for the defendant, moved to discharge the order for the publication of the depositions, insisting that the cross-examination, as well as the examination in chief, ought to have been repeated.

Mr Heald, on the other side, argued that the order having only given the plaintiffs liberty to examine and cross-examine, was not imperative upon them; and that if any of the evidence on the cross-examination was advantageous to the defendant, he was enabled to read it.

The Lord Chancellor inquired if all the plaintiffs were competent to consent, and finding that some of them were infants, said that the court could not take their consent to have what were not depositions read against them. It was not at the option of the plaintiffs to cross-examine or not; if that were the practice, the consequence would be that a party might misentitle the interrogatories, and then, when he found that matter came out upon the examination of some of the witnesses, that made against him, he might refuse to examine them again, and get rid of their evidence(*a*).

Hill *v.* Reardon.

Jacob, 84.

Semble, Notwithstanding a decision of the commissioners appointed by the stat. 59 G. 3. c. 31, and the conventions for liquidating the claims of British subjects on the French government, or of the privy council on appeal, in favour of a claimant, his right may be disputed, and he may be declared a trustee of the sum awarded to him for other persons, showing themselves to be entitled.

Injunction refused, the affidavit of the plaintiff 's title not being positive.

April 5, 7, 14, 17, 30.

THE bill stated, that by a settlement on the marriage of James Fanning and Frances his wife, some property belonging to the latter was settled to her separate use; in the year 1777, they purchased certain estates in the provinces of Maine and Anjou, in France, one half of the purchase-money for which was paid out of Frances Fanning's separate property, and the estates were conveyed to her and her husband as tenants in common. She died in the year 1788, intestate, leaving a son, J. R. F. Fanning, and a daughter, Mary Rose Fanning; her son became, by the then laws of France, entitled to her moiety of the estates, and upon his death intestate in the year 1796, his sister became his heir; she died intestate and unmarried in the year 1801, and her interest in the estates then descended, as the bill alleged, to the plaintiff Ann Hill, a collateral relation, as her next heir according to the law of France. James Fanning, the father, survived both his children, and by his will, dated in 1804, gave all his property to the defendant Devereux, and appointed him and another person his executors; he died in 1806, and Devereux alone, some time after, proved his will. In the mean time the estates in question had been sequestered, about the year 1792, by the then government of France.

By an article in the treaty of peace between Great Britain and France,

(*a*) See Curre *v.* Bowyer, 3 Swan. 357.

dated the 30th of May 1814, it was stipulated that commissioners should be appointed to undertake the examination of the claims of British subjects on the French government, for the value of property illegally confiscated in France; and by the treaty of the 20th of November 1815, and two conventions annexed to it, a capital producing an annual interest of 3,500,000 francs, was to be inscribed in the great book of the public debt of France, in the names of commissioners, as a fund of guarantee for liquidating these claims, and a period was appointed for persons to bring forward claims, after the expiration of which they were no longer to have the benefit of the liquidation.

By the statute 59 Geo. 3. c. 31, after reciting these treaties and conventions, it was recited that commissioners had been appointed on the part of Great Britain, that they had inscribed in a register the names of all claimants who presented themselves within the period prescribed, and had liquidated and caused to be paid sums amounting to 2,945,000 francs of interest to various persons so inscribed in the said register. It then recited another convention of the 25th of April 1818, under which an additional sum, producing an interest of 3,000,000 francs, was transferred for the same purpose. It noticed also conventions that had been made for arranging certain other claims upon the French government, and that commissioners of liquidation, arbitration and award had been appointed for the execution of all the conventions, and commissioners of deposit, in whose names the sums were to stand.

The act then empowered the commissioners of liquidation, according to the forms they had hitherto observed, to apportion, divide, and distribute the sum amongst, and to order the same to be paid to, the several claimants whose names were duly entered in the said register, in part or in full of their claims; and such payment in full or in part, and any rejection of such claims as should by the commissioners, or on appeal to his majesty in council, be adjudged not to be within the meaning of the conventions, was to be final and conclusive, and was to be a full and entire discharge of the French government, and of his majesty's government, from any demands in respect of any claims falling within the true intent, effect, and meaning of the conventions, and which had been inserted in the registers during the period allotted for that purpose. When they approved of a claim, they were to make an order upon the commissioners of deposit to transfer accordingly. Claimants dissatisfied with the determination of the commissioners, might, within three months, appeal to the king in council, who was empowered to hear the matter, and finally determine it. In case any dispute should arise between any parties interested in any claim, and the commissioners should be unable to decide as to the person legally entitled to the amount of the claim adjudged by them, or as to the competency of the person to give a valid discharge, the sum adjudged was to be sold out, and the produce paid into the Bank of England, in the name of the accountant-general of the court of chancery, and the court was, upon petition or motion, to order transfer or payment to the persons entitled.

The bill stated that the defendant Devereux, as the personal representative of James Fanning, without the plaintiff's knowledge, made a claim before the commissioners for the value of the estates in question; his claim being rejected, he appealed to the king in council, where a decision in his favour was made on the 29th of September 1820; in consequence of which a sum of 23,096 francs of annual perpetual rente was awarded to him, and an order upon the commissioners of deposit for a transfer of that sum was

delivered to the defendant Reardon, who was the appointed agent of Devereux. The bill insisted that the plaintiff was entitled to a moiety of the rente of 23,096 francs, of which it prayed an account, and an injunction to restrain the defendants from transferring it.

A motion was now made for an injunction against the defendant Reardon, the other defendant, Devereux, being out of the jurisdiction. The motion was supported by an affidavit, made by the son of the plaintiff, deposing to the different facts stated in the bill, but speaking as to his belief only.

Mr Horne and Mr Wakefield, for the plaintiff.

If the property had remained in specie, the plaintiff would, according to the laws of France, have been entitled to a moiety; and she has, therefore, the same right with respect to the compensation awarded in lieu of it; and the defendants, having obtained the whole, must be considered as trustees for the plaintiff as to a moiety. Upon the question of the jurisdiction of the court, they mentioned a late case of Hatchett *v.* Pattle(*a*), in which the Vice-Chancellor was of opinion that the act and conventions in question did not preclude the interposition of the court, and that the fund awarded by the commissioners was subject to the same equities in the hands of the party receiving it, as the property in lieu of which it was given would have been. If we had been apprized of the facts before, we should have made a claim, and the money would then have been paid into court, and our right to it would have been decided here.

Mr Fonblanque, Mr Hart, and Mr Roupell, for the defendant, contended that the act and conventions had shut out the jurisdiction of the court. It is expressly declared, that the decisions of the commissioners, or of the king in council on appeal, shall be final. The parties had no previous right to claim the fund in question; it is a benefit derived only from the bounty of the two governments, and conferred by the conventions; it cannot, therefore, be made a subject of litigation. The Nabob of the Carnatic *v.* The East India Company(*b*). It must be received, not as a matter of right, but as a gift, in the manner in which those who give it think fit. If, indeed, the defendant had claimed, in the character of executor, it might have been held that the fund would be assets; or if he claimed as a trustee, that his *cestui que trusts* might call for an account; but he claimed and recovered as the person legally and beneficially entitled, and the plaintiff now insists upon an adverse legal title, and not upon any equitable right. How then can any trust be raised?

According to the law of successions, which prevailed in France from 1794 to 1803, the property of persons dying without leaving issue, or brothers or sisters, or the issue of brothers or sisters, ascended to their parents, or the survivor of them; hence the right of Mary Rose Fanning, upon her death in 1801, became vested in her father, under whom the defendant Devereux claims. They also insisted, that the affidavit on which the motion was made, being sworn by a person not a party, and speaking only to information and belief, did not verify the facts so as to warrant the court in granting an injunction.

The Lord Chancellor. It strikes me that the act does not prevent

(*a*) Reported on another point, 6 Madd. 4. (*b*) 1 Ves. Jun. 371. 2 Ves. Jun. 56.

this application. It provides only for those who had made claims prior to it; it gives an appeal to the privy council, and makes their determination final; but that can only be as between the parties to that determination, and persons not having claimed before could not go in under it. The question is, whether the act is to be considered as definitively deciding that those who had not claimed before it passed, were to have no claim at all.

It seems to me to amount to this, that Devereux, as the executor of Fanning, made a claim before the commissioners; they rejected it, but, upon appeal, it was allowed: nothing was then said about the plaintiff or her claim. Then consider the effect of the convention and the act; they give a jurisdiction to the commissioners as to claims previously made, but, did they intend to put an end to all rights, equitable or otherwise, which the parties entitled had not then claimed? It seems, that if a person claims, and receives in the character of a trustee, the act would not shut out the equities of his *cestui que trusts*. It seems, also, that when the same sum was claimed by several persons, it was to be paid to the accountant-general, and the right to it settled in this court; but the act does not say, that unless persons claiming an equitable title to the money go in before the commissioners, and have it paid into court, they shall make no claim afterwards.

The next question is, supposing for a moment that I have jurisdiction, whether a case is made out to authorize a restraint upon the property, I will read the bill and affidavit and then decide it; and in the mean time the defendant must not transfer.

April 14, 17, 30.—The Lord Chancellor said, that the affidavit as to the French law was not sufficient; it was a subject on which there might easily be a mistake, and the affidavit ought to be made by a professional person.

An additional affidavit was afterwards filed on the part of the plaintiff, sworn by a person who had practised as an advocate in France. His lordship expressed himself to be satisfied with it, as establishing the point of law for which the plaintiff contended, but ultimately refused the injunction, on the ground that the affidavit of the facts was not sufficient.

The East India Company *v.* Bazett and others.

Jacob, 91.

New trial of an issue granted, the verdict being unsatisfactory from the circumstances under which the jury returned it.

May 5.

THIS was a bill of interpleader filed against several persons claiming respectively to be entitled to sixty-two chests of indigo, of which the plaintiffs were holders. On a motion to dissolve the injunction, an issue was directed to try whether the defendants Cannan and Harper, were entitled to the indigo in question; they were to be the plaintiffs, and the other defendants the defendants in the issue. The trial took place at

[The East India Company *v.* Bazett and others.]

Guildhall, before the lord chief justice of the king's bench and a special jury, and a verdict was found for the defendants.

A motion being now made for a new trial, the following circumstances appeared by affidavit. After the summing up, the jury retired to consider their verdict; and having been absent a considerable time, the foreman and two others, about four o'clock in the afternoon, returned into court; and the foreman addressing himself to the lord chief justice, asked how they were to act, saying that they had been turning it all manner of ways, but could not agree, and they differed so much, that they thought it impossible that they could agree. The lord chief justice answered, that he had no means of permitting them to separate without their agreeing; upon which one of them replied, that it was sometimes done by the parties consenting to withdraw a juror. The lord chief justice then, after some communication with the counsel, desired the jury to retire again to their chamber, while the solicitors and their clients consulted, the result of which should be communicated to them. They retired, and after some interval returned, and found a verdict for the defendant: the statements as to the length of the interval during which they were absent, varied from a quarter of an hour to an hour. It was stated in the affidavits on one side, that the defendants' counsel had, in the hearing of the jury, offered to consent to withdraw a juror; on the other side, it was represented that the jury could not have known from which party the refusal to withdraw a juror came. It appeared, however, that during their absence, they had twice sent the officer, under whose care they were, to bring to them the plaintiffs' attorney, expressing, at the same time, a great unwillingness to be detained; he, however, both times refused to go to them, and it was shortly after his second refusal that they returned with their verdict. An application for a new trial had been made to his honour the Vice-Chancellor, who refused it.

Mr Tindal, Mr J. Evans and Mr Teed, in support of the motion, postponed the other objections that they had to the verdict, till that arising from the circumstances attending the conduct of the jury, on which alone they contended that it must be set aside, should be disposed of. They cited Hale *v.* Cove(*a*).

Mr Wingfield and Mr Rose, on the other side, contended that there was no reason to suppose that the jury, composed of very respectable individuals, had come to a conclusion unfairly; and they contended that the verdict was consistent with the evidence.

The Lord Chancellor. This is a bill of interpleader, filed by persons in possession of property, stating the claims made to it by the several defendants; and if the old practice were pursued, it would not be of course that it should go to a jury; for the parties may be required to proceed here in the examination of witnesses, and this court may then decide upon the result of the evidence. But in many cases, the court foreseeing that the matter must finally be tried before a jury, directs at once an issue or an action; but although the shorter course is thus taken, the principle must be the same as with an issue directed in the common way. There is this difference between a motion for a new trial in a court of law and in a court of equity. In a court of law, if the jury find the fact, although the judge may think differently, yet it is permitted to stand, for the finding the

(*a*) 1 Stra. 642.

[The East India Company *v.* Bazett and others.]

fact is the province of the jury ; but here the verdict is something more than the verdict of the jury ; it must be such as to satisfy the court, that it can make that its own declaration of the fact, which the jury have made theirs.

Then was this case so satisfactorily tried, that the conscience of the court can be assured that it was duly considered and duly decided ? The jury were charged by the judge, and perhaps they might have been charged to decide in the manner in which they have decided ; they then retire, whether for an hour or half an hour is not material, and then three of them return to the court, and represent that it is a case of such difficulty, that they think they never shall agree. Now whether they did or did not think that one party would consent to withdraw a juror, and that the other would not, is a question raised upon these affidavits, but with which I will not trouble myself ; nor will I suppose that they decided for the defendants, because the plaintiffs' solicitor would not answer their summons ; but looking at their going out of court under these circumstances, not having then agreed, and at their not having agreed up to the time of their sending the second message to the plaintiffs' solicitor (for that is the conclusion I draw from their sending that message), I cannot consider that the question, which they could not decide in two hours, could be properly settled in so short an interval as elapsed between that message and their delivering the verdict. I do not think that is the way in which issues from this court should be tried. I beg it to be understood that I do not impute any thing to the jury : they probably thought it was the best verdict ; but there was not a period sufficient for consideration between the existence of the difficulty and its removal.

New trial granted.
Reg. Lib. A. 1820. fol. 1365.

Ex parte Ord, in the matter of Shields, a Lunatic.

Jacob, 94.

The committee of a lunatic ought to be resident within the jurisdiction of the court, and, therefore, an allowance made him for expenses in visiting the lunatic, discontinued on his going to live in Scotland.

May 8.

THIS was the petition of the committee of the person of the lunatic, praying (*inter alia*) the payment of the arrears of a sum of 40*l.* per annum, directed to be allowed to him as a compensation for the expenses incurred by him in visiting the lunatic. It appeared that the petitioner had resided in Scotland from 1813 to 1821.

Mr Heald and Mr Pemberton, in support of the petition.
Mr Trover, against it.

The Lord Chancellor. If a sum was allowed the committee for the expenses of visiting the lunatic, and he thinks proper to retire out of the jurisdiction, where the court cannot compel him to do his duty, the court

[Ex parte Ord.]

would not order it to be paid to him. It must be paid to some one over whom the court has a control(*a*). If an application had been made, stating that he was gone to reside permanently in Scotland, the court would have said that the allowance should be discontinued. He ought not, after going there, to have continued in the character of committee. It was his duty to have given it up ; and I cannot allow this petition for the sake of the principle ; but you may take an inquiry, at the peril of costs, as to any expenses actually incurred.

The order declared that the petitioner was not entitled to the allowance of 40*l.* per annum claimed by him, and directed the Master to inquire, regard being had to any visits which he should find to have been actually made by the petitioner to the lunatic at his place of residence, whether any, and what sum ought to be allowed him for such visits.

Watkins *v.* Maule.

Jacob, 105.

A creditor whose debt has been disallowed by the Master, and allowed by the court upon petition, is not entitled to costs.

Rolls.—May 11, 17.

AFTER the hearing of the petition reported in 2 Jack. & Walk. 237, an order was made, referring it back to the Master to review his report, and inquire into the validity of the petitioner's claim. In addition to the facts stated on the former occasion, it was discovered that another promissory note of Hall's had been duly indorsed to the petitioners, for securing the same sum for which the note in question in the former case was given. The Master having reported 2000*l.* and interest to be due to the petitioners, they now petitioned for a confirmation of the report, and prayed that their costs of this and the former petition, and of the last reference, might be paid out of the testator's estate.

Mr Horne and Mr Pemberton, in support of the petition.

Mr Cooper for the executors, and Mr Whitmarsh for the plaintiff, opposed it so far as it prayed costs.

May 17.—The Master of the Rolls. With respect to the petitioner's debt, I was clearly of opinion when it was formerly discussed, that their claim was valid; and I am glad to find that on further investigation a fact has been discovered, that puts it out of all doubt; another note having been given which was duly indorsed. This has done away with what gave rise to the question, and if previously discovered, would have saved much expense, by rendering great part of the discussion wholly unnecessary. A considerable question has, however, arisen, whether, in a case like this, any costs ought to be allowed. The costs here sought for are not those

(*a*) See post, Logan *v.* Fairlie.

incurred in consequence of the opposition to the petitioners before the Master, but the costs of the petition to the court to set right the decision of the Master, and of the subsequent reference and proceedings.

First, it is necessary to consider, whether a creditor is ever entitled to be allowed any of the costs that he is put to, either in the first instance, or in any stage of the proof of his debt. And it is clear now that their costs are not allowed, though a different opinion prevailed once, founded on a principle not very unreasonable, that as the creditor is compelled to stop in a proceeding at law, where he would recover both his debt and costs, he ought in coming in under the decree in this court to be put in the same situation. And, accordingly, in the case of Lord Orwell *v.* Lord Hinchinbrooke, in 1776, and Skeene *v.* Pepper(*a*), in 1804, the creditor's costs were paid; and I think I have seen a case where the same was laid down by lord Macclesfield(*b*). But those cases have been overruled, and the practice settled by Abel *v.* Screech(*c*), decided by the Lord Chancellor and the Master of the Rolls. This, I apprehend, determines the question as to the costs before the Master; but a distinction is attempted to be made between those and the costs occasioned by the petition here. With respect to that, I wished to know if any case could be found where the costs of such a proceeding had been allowed; but though it must have often happened that creditors have appealed against the Master's opinion, yet I do not find that any case has occurred where the costs have been allowed. I think the reason is clear. In all cases of appeal from the Master, by excepting to his report, the party excepting, if he succeeds, recovers his deposit, but he never has costs; it being an appeal from the erroneous decision of the officer of the court, who by his error has occasioned the expense. We are to consider not only whether the one party ought receive his costs, but whether the other ought to pay them. The court has here taken upon itself the distribution of the estate, referring the creditors to the Master; if he decides against a debt, the executor cannot prevent it; it is the decision of the Master, and not the opposition of the executor that drives the party to the necessity of seeking the opinion of the court.

It frequently happens that the fund which is to be administered is insolvent, and it is the interest of all parties to keep it clear from these extra costs. To enter into distinctions with respect to the different degrees of difficulty in the proof, would lead to disputes that would be productive of great expense: it is better to keep to the general rule. And though in this case I think the petitioners were unfortunate in having a decision against them, in a case where, as it appears to me they were clearly entitled, yet, it must be remembered, that they have the less reason to complain, from having at first brought forward their case so imperfectly.

I think there cannot be any distinction with respect to the costs of the last reference, for it was rendered necessary in the same way, by the act of the officer of the court; it was only from the Master entertaining an opinion against the petitioners in point of law, that the facts were not investigated at first. Without, therefore, saying that there may not be cases where the court may have power to give the costs, I think it cannot be done here. Perhaps, if the case was reversed; if the Master had decided in favour of the creditor, and the executor was the appellant and was in

(*a*) See 10 Ves. 356. (*b*) Maxwell *v.* Wettenhall, 2 P. Will. 26. (*c*) 10 Ves. 355.

the wrong, the creditor being in the right, might be considered entitled to be paid the costs occasioned by an improper appeal(*a*.)

Reg. Lib. B. 1820, fo. 1009.

Clarke *v.* the Earl of Ormonde.

Jacob, 108.

It is the duty of executors, as far as possible, to preserve articles specifically bequeathed according to the testator's wish, and unless compelled, they ought not to apply them to the payment of debts.

If a suit be commenced for administration of the estate, it is the duty of the executors by putting in their answer speedily, to facilitate the obtaining a decree, under which the estate may be protected from actions.

Semble. When real estate is devised for payment of debts, and articles of personalty exempted, if the executors, to preserve the latter from the creditors, delay selling them and in consequence a loss happens it may be thrown on the real estate.

Plea by a trustee of a settled account and release, to inquiries as to the execution of a trust, held bad, for want of averments that the matters inquired after would appear from the account. Plea of a settled account and release to a bill by cestui que trust against trustee, will not extend to the discovery of vouchers.

March 21, 24. April 5, 30. May 23.

BY private acts of parliament, passed in the 35th, 45th, 48th, and 58th of Geo. 3., and by indentures of the 22d of February 1808, several estates in Ireland were vested in trustees, upon trust to raise money for the discharge of the incumbrances affecting them, and of the debts of the Right Hon. Walter Marquis of Ormonde, who, subject to the trusts, was entitled to the estates in fee. The surviving trustees were Sir J. Graham, the Hon. Douglas Kinnaird, and Charles Butler, Esq. The marquis made two wills, both dated on the 28th of February 1820; the first relating to his property in Ireland, the second to that in England.

By the first will he directed that if the trusts of the acts of parliament and indentures of February 1808 should not be performed at the time of his death, the trustees should proceed in the execution of them, and should also, by sale or mortgage, discharge all his debts, which were not provided for by those trusts and his legacies, subject to which he directed the estates to be settled to the use of his first and other sons in tail-male, with remainder to his brother, the Hon. James Butler, for life, with remainders to his sons, and their issue, with remainder to his brother, the Hon. C. H. Butler Clarke (one of the plaintiffs) for life, with other remainders over. He gave the service of plate, fixtures, furniture, and books at his castle of Kilkenny to the same trustees, in trust to permit the same to be used, held, and enjoyed as heir-looms, as far as the rules of law and equity would admit, by the person or persons who, for the time being, should be entitled to the title and dignity of Marquis of Ormonde or of Earl of Ormonde and Earl of Ossory; but his will was, that the same should not, for the purpose of transmission, vest absolutely in the child of any person entitled to have and enjoy the said title or dignity, and who should be living at

(*a*) See Harvey *v.* Harvey, 6 Mad. 91, and Waite *v.* Waite, 6 Mad. 110.

the time of his decease, unless such child should attain the age of twenty-one years; inventories were to be made by the trustees, who were from time to time to cause such reparations and replacings to be made as they might think proper. After giving several legacies, he directed that all his debts, which were not charged upon his real estates in England or Ireland, and his legacies should be paid out of his personal estate in Ireland not specifically bequeathed; he declared that his said personal estate was to be the primary, and his real estate the auxiliary fund for the payment of his said debts and legacies; but he excepted his personal estate from the payment of the annuities given by his will or any other testamentary papers, and charged them upon his real estates in Ireland. He appointed the same trustees to be his executors.

By the other will he devised his estates in England to the Marquis of Huntley, Sir J. Graham, and Charles Butler, their heirs and assigns, upon trust, to settle his mansion-house at Ulcome and some other premises, in default of issue of his own body, to the use of his brother the Hon. C. H. Butler Clarke for life, with remainders to his sons and their issue, and other remainders over: the other part of his English estates was to be settled to the use of his brother the Hon. James Butler for life, with remainders to his sons and their issue, and other remainders over. He gave a service of plate to the trustees to be used and enjoyed as heir-looms by the person or persons for the time being entitled to his mansion-house at Ulcombe, in terms similar to those applied in the other will to the plate, &c. at his castle of Kilkenny. He gave his leasehold house in Bryanstone square, with the plate, furniture, and other effects in it, to his brother the Hon. James Butler, to whom he also gave the residue of his personal estate. He charged the debts which he might owe in England, and which were not specifically charged on his Irish estates by any deed or security, or which were not provided for by his other will, upon the English estates, devised to his brother James Butler for life: he appointed the Marquis of Huntley, Sir J. Graham, and C. Butler executors of this will.

The testator died on the 10th of August 1820, without issue, and was succeeded in the title of Earl of Ormonde by his brother James Butler. He was indebted to a large amount, and there were also considerable sums of money, the payment of which had been provided for by the acts of parliament, and the indentures of February 1808, which still remained unpaid; the estates which by the wills were charged with the payment of these debts and the legacies, were more than sufficient for the purpose, without resorting to the specific legacies. The bill which was filed in December 1820, by the Hon. C. H. Butler Clarke, and his two sons, for the execution of the trusts of the will, insisted that after exhausting the testator's personal estate in Ireland not specifically bequeathed, the trustees ought by sale of the Irish estates to raise money for the payment of the debts and incumbrances, and prayed an injunction to restrain them from selling or disposing of the services of plate and the other effects specifically bequeathed by the wills. Another suit, Beaucamp *v.* The Marquis of Huntley, was commenced about the same time, by a creditor of the Marquis of Ormonde, praying the usual accounts and the application of the assets to the payment of his debts. The answers had not been put in to either of the bills. A motion was now made on the part of the plaintiff C. H. Butler Clarke for an injunction as prayed by the bill, and also that he might be let into possession of the estates devised to him, on entering into a recognizance to account for the rents and profits.

[Clarke *v.* The Earl of Ormonde.]

The Lord Chancellor observed upon the opening of the motion, that when a testator gives articles, intending them to descend as heir-looms, it is the duty of the executors to see, as far as they can, that the will is duly executed, and that that intention takes effect, unless compulsory measures are resorted to against them; the creditors may by adopting such measures drive them off that ground, but they are not voluntarily to take themselves off it.

April 5.—The motion stood over for some time, in consequence of the absence of the defendant's counsel, upon an undertaking that no sale should take place in the mean time. It came on again this day.

Mr Heald and Mr Koe for the plaintiff, Mr Hart and Mr Roupell for lord Ormonde, in support of the motion.

Though the testator's personal estate, even including the specific bequests and heir-looms, will not be sufficient for the payment of his debts, yet the estates devised for that purpose will, when sold or mortgaged, supply an ample fund. In the mean time, we desire that the executors should be restrained from applying these articles in payment of the debts; to do this spontaneously would be a great disregard of the wishes of the testator; and it does not appear that there is at present any creditor pressing for payment, who is in a condition to take out execution and seize the property. When that happens, the court will be able to provide for it: the question is not now with the creditors; their rights cannot be affected by this motion. No difficulty would arise if the defendants would put in their answers: a decree might then be obtained, which would protect the estate from any proceedings at law on the part of the creditors, that being equally the consequence of a decree for the administration of the estate, whether the suit is by a legatee or a creditor. Jackson *v.* Leaf, 1 Jac. & Walk. 229. But another suit has been commenced by a creditor, to which the executors are more friendly than to this, and they are anxious to have a decree made in that first, the effect of which would be to stop this. They refuse to put in their answer in this suit, till we have answered in the other, though this bill, praying more extensive relief, is, as we conceive, better calculated for the administration of the estate.

Mr Horne and Mr Lynch, for the executors, contended, that there was no authority for such a motion as the present. The executors are placed in a very difficult situation, being much pressed by the creditors, and several actions having been commenced against them. They have not any adequate funds in hand, and cannot prevent the creditors from seizing. The executors are only desirous of indemnity, but they consider the other suit to be best adapted to the case.

The Lord Chancellor. It is the duty of the executors to put in their answers in both suits; they have nothing to do with throwing the management of the business into any particular hands. They should put in their answers, whether the other parties will or will not put in theirs; all the answers should be put in, and they should then leave to the court to deal with the two causes. If lord Ormonde had consulted the gentlemen who are his trustees, as to how he could preserve these articles as heir-looms, I have no doubt they would have told him, that after his death a bill would be filed, and they should answer it, and then a decree would be made, after which the creditors could not proceed at law.

[Clarke v. The Earl of Ormonde.]

The motion is to restrain the executors from selling the plate and other articles. When a testator makes a will, providing that certain parts of his property shall be applied in payment of his debts, and other parts of his property are specifically bequeathed, or are given to trustees, with directions to be treated as heir-looms, his intention is that his trustees and executors, as far as they may be able, as far as by law they may be permitted, shall devote to the payment of his debts that part of his property which is given for that purpose, and that the other part shall not be so applied, if it is in their power to withhold it; and I take it that it is their duty to execute that intention according to the dictates of the will, as far as they can. On the other hand, no testator can in any way exempt any part of the personal estate from applicability to the payment of his debts, nor can he put into the hands of his executors the means of defending themselves at law; and, therefore, those who insist on the property being withheld from sale according to the will, are bound, as far as they are able, to put the executors into possession of the means of defending it; they ought not to be contending about which shall put in their answers first; they should give to any one who may file a bill the power of having the protection of the court. But if they have commenced this suit, they have tendered to the executors all the indemnity that they can want, by giving them an opportunity of answering, and of having a decree made. I will not condescend to enter into the question, which bill is best framed for the execution of the trusts of the will; it will be time enough to do that when I see what the record is in both. The court will then take care either by conjoining the two suits, or by restraining the one and making a decree in the other, to provide for the execution of the trusts; when it comes on, there will be no difficulty in knowing what to do.

How far these articles may be protected against an immediate or final application to the debts, I cannot yet know, but I may venture to say, that heir-looms are a kind of property that are rather favourites of the court; and we may observe, that the court in its ordinary decrees directs at first only an account of the testator's personal estate *not specifically bequeathed.* And if the creditors of this family, claiming satisfaction of their debts out of the real estates under the provisions of the will, are disappointing the will by proceeding against property that was intended to be exempted, I will not go the length of saying that they can claim the benefit of the devise for their payment, if they are not satisfied with that which the testator has given to them, and which the law has not given to them; nor will I say that if they will not take the provision made for them by the will, that they will not be obliged to take that provision only, which they are entitled to by law(*a*).

The best way will be to get both the causes to a hearing; therefore let this matter stand over for a week, and then inform me what state they are likely to be in.

The executors have a right to say, that if they do not sell, and if the property should be deteriorated in value, in consequence of their not selling, it may be contended that they should be chargeable with the deficiency; but I should be disposed to say that they cannot be answerable, that is, not finally, for the testator having directed the preservation of the articles, I should think that the court would be authorized to throw the loss

(*a*) *Sed vide* Kidney *v.* Coussmaker, 12 Ves. 136, 154.

upon the real estates charged by the testator with the payment of his debts.

As to the other part of the motion, there does not seem to be any reason why the plaintiff should not be let into possession, giving security for the rents and profits; the security to be approved by the Master, not upon his own recognizance. The court will lend a favourable ear to applications of that kind by a tenant for life, whose interest is wearing out, if it can be done consistently with the other objects that it has to attend to. The plaintiff must give security for the furniture also. I shall take care that the priority or posteriority of putting in the answers shall not effect any object for either party.

The order directed that the plaintiff, upon giving such security as the Master should think fit, should be let into possession of the estates devised in trust for him, and that the furniture, books, pictures, plate, &c. should be delivered to him.

Reg. Lib. A. 1820, fo. 1297.

April 30.—The bill seeking accounts relating to the estates vested in trustees for sale, in the lifetime of the marquis of Ormonde; the defendant Butler put in a plea as to part, and answered as to the rest. To so much of the bill as sought a discovery of the value in the whole, without the particulars, of the estates, other than of such as remained unsold at the time of stating and settling the account after-mentioned; and of the amount in the whole, without the particulars, of the debts, charges and incumbrances, the payment of which was provided for by the acts of parliament and indentures in the bill mentioned, other than of such as remained unpaid at the time before mentioned; and of the amount in the whole, without the particulars, of all sums of money received by the trustees, for and on account of the sales, and of the rents and profits of the estates and hereditaments, in the interval, from the time of their being appointed trustees in the year 1808, up to and including the 27th of March 1817, in Ireland, and up to and including the 31st of December 1817, in England; and of the amount in the whole, without the particulars, of the sums so received, which were, during the periods aforesaid, applied in payment of the debts, charges and incumbrances, and interest thereon; and whether the defendant had, or when last had in his possession or power, divers, or any, and what accounts and vouchers, or an account and voucher, relating to the receipts and payments of the trustees, from the time of their being appointed trustees as aforesaid in the year 1808, up to and including the said 27th of March 1817, as to Ireland, and up to and including the said 31st of December, in England; and to so much as prayed that the defendant might set forth a list or schedule of them, and produce and leave them in the hands of his clerk in court; and, as prayed, accounts of the sums of money received by the trustees during the same period, and of their application: the defendant pleaded, that he and J. Hosier (one of the trustees), who had survived W. Moreland and J. H. P. Clarke (the two other trustees), who were both then dead, previously to the 24th of July 1819, rendered an account to the marquis of Ormonde, of all their receipts and payments concerning the trust premises, vested in them by the acts of parliament and indentures (that is to say), of and concerning all the receipts and payments, in respect of every or any sum or sums of money received and paid by any person or persons resident in Ireland, either as

principals or agents up and home to and including the 27th of March 1817; and of and concerning all receipts and payments, in respect of any and every sum received and paid to any person or persons resident in England, up and home to and including the 31st of December 1817; and that the marquis examined, inspected and considered the said accounts and vouchers of the said J. Hosier and the defendant, and that he was satisfied with the same, and settled and signed the same in approbation thereof; and that by a deed poll, bearing date on or about the 24th of July 1819, under his hand and seal, he did testify and declare that he had examined, inspected, and considered the said trust accounts, and that he was satisfied with the same; and that he for himself, his heirs, &c., did, from the said trust accounts, and from all sums of money received by the said J. Hosier and the defendant, before and up to and including the 27th of March 1817, in Ireland, and before and up to, and including the 31st of December 1817, in England; and from all actions, suits, claims, and demands, on account or in respect thereof; and on account or in respect of any and every act, deed, matter, or thing, before, up to and including the said 27th of March 1817, as to Ireland, and the 31st of December 1817, as to England, done or executed by reason or on account of the said trust premises, absolutely acquit, release, and for ever discharge the said J. Hosier, and the defendant, their heirs, &c., and the heirs, &c. of the said W. Morland and J. H. P. Clarke (then deceased), and their and each of their estates and effects whatsoever and wheresoever, as by the said deed poll in the defendant's possession and ready to be produced, would appear.

The plea was set down before the Lord Chancellor, and this day came on to be argued.

Mr Heald and Mr Koe, for the plaintiffs.

The plea covers too much, as there is no reason, though the trustees have accounted, why they should not set forth what estates were conveyed to them; the vouchers also ought to be discovered. The period over which the protection from discovery extends, is not defined with sufficient precision, it not being mentioned in what part of the year 1808 the trustees were appointed, or at what precise time the account was stated and settled. If it is to be considered as a plea of a stated account, the balance should be set forth; if it is a plea of a release, it should state the consideration.

The Lord Chancellor, after reading the plea, observed, that it stated nothing more than this, that an account was settled up to such a time, without any averment, that from that account it would appear what estates were sold, and what was their value. So, with respect to the vouchers, it is a plea in bar against producing them; but the persons entitled to the estates now have the same right to them that the late marquis had, for they have the same right to protect the estates against the payment of the debts.

If you could make it good by stating more fully the effect of the deed, or by averments, I should be sorry to refuse you leave to amend. But take the case as strongly as you can. Suppose the late marquis was seised in fee of these estates, and created trusts for the payment of his debts; being tenant in fee-simple, any act done in execution of those trusts is binding on those who come after him. But he would have a right to say to the trustees, What estates have you sold? What debts have you paid? And those who claim under him have the same right. Having a right to

all that information, a plea to bar him of it, must show either that he has had that information given him, or that he has waived it; and a plea not showing that, is insufficient.

Primâ facie, the marquis of Ormonde, and all claiming under him, have a right to ask what was the value of the estates, the amount of the moneys raised by sales and from the rents, and of the debts and incumbrances paid, and of those remaining unpaid. If the fact be, as it probably was, that an account was rendered, satisfying all these inquiries, by furnishing the particulars, forming each of the totals which are the subjects of inquiry, and that the deed referred to those accounts, then the plea should have been, that such accounts were rendered, by which these things appeared, and that by the deed the marquis signified that he approved that account, thus manifesting all these particulars; but this plea does not aver any thing of that kind.

But if that were so, still I think he would be entitled to the inspection of the vouchers. I state that without prejudice to what may be said upon it. If there was a settlement of all the matters relating to this trust, the trustees would be entitled to the possession of the vouchers, as their discharge to the marquis; but he would have a right to the inspection of them as his documents, to be used by him against all who might be making demands upon him, in relation to these debts.

The difficulty I have is, that the matter of the plea does not go to the matter inquired after. It may, perhaps, be made good by averment.

His lordship then desired the plea to stand over, for the defendant's counsel to consider the objections to it, and to be heard in support of it, if they thought fit; which they afterwards declined.

May 17.—This cause, and the cause of Beauchamp *v.* The Marquis of Huntley, were set down to be heard this day, and a decree made according to minutes agreed upon by the parties, establishing the wills, and directing a general account of the testator's property and debts. The plea was ordered to stand for an answer; and if the Master should find any settled account or release, respecting the rents of the estates and the moneys arising from the sales, it was not to be disturbed, and the accounts were to be taken only from the close of such settled account and release, and from the foot of the same, without prejudice to any suit any of the parties interested might be advised to institute respecting the same. It directed the appointment of receivers of the estates, and that the defendant, the earl of Ormonde, should be let into possession of Kilkenny castle, and the demesnes, but without prejudice to what the court might think fit to do, in case any application should be made to rent the said castle and demesnes; and the trustees and their agents were to have access to the muniment room in the castle, and to the muniments therein, and also to the rent-office at seasonable times. The costs of the suit of Beauchamp *v.* The Marquis of Huntley were to be taxed and paid out of the testator's estate, and thereupon the bill to stand dismissed.

Two of the creditors had brought actions against the executors, which stood for trial at the time when the decree was pronounced. The plaintiffs gave them immediate notice of the decree; they, however, proceeded, and a day or two after, the actions were tried, and they obtained verdicts. A motion was now made on the part of the plaintiffs, that these creditors

might be restrained from further proceedings, that the executors might pay them their costs in the actions, and might also pay into court, upon oath, the balance of the testator's estate in their hands.

The Lord Chancellor, on the opening of the motion, expressed some surprise that it was not made on the part of the executors; for he took it to be clear, that if after a decree to account, the executors let judgment go by default, or permitted the creditors to proceed at law, they would be responsible; if the creditors took property of the testators in execution, the executors would not be able to charge it to the estate; they might be allowed to stand in the place of those creditors against the estate, but they could not do more. In this case, his lordship thought, that if the creditors levied on the property, the court would compel them to bring it back, but the executors might stand in an awkward situation.

Mr Heald and Mr Koe, for the plaintiffs; and Mr Roupell for lord Ormonde, in support of the motion.

The executors not having applied for this injuction, there is no reason why it should not be done by other parties interested. In their answers they have not set forth the balance in their hands; and, therefore, according to Paxton *v.* Douglas, 8 Ves. 520, and Gilpin *v.* Lady Southampton, 18 Ves. 469, they must, if they had made this motion, have made an affidavit as to the state of the funds; that is the ground for the latter part of the motion.

Mr Horne, for the executors, contended, that the motion as to their paying in the balance was unprecedented; the plaintiffs, if they required the information, should have excepted to the answers; the executors had, in fact, no funds in hand.

Mr Agar, for the creditors.

There has, hitherto, been no instance of restraining a creditor, upon the application of a legatee; it has never been done except on the motion of the executors. If the order be made, the creditors, who otherwise might pay themselves, must wait till all the accounts are completed, for a period, perhaps, of many years; and the interest upon their debts, of which they are thus deprived, accumulates for the benefit of the legatees. Will the court extend this practice to a new case, where an attempt is made by legatees to derive advantage to themselves, at the expense of the just rights of creditors?

The Lord Chancellor. The first question is, what would be done if this application had been made by the executors? and I do not mean any reflection on them when I say, that I think they ought to have made it. Ever since the case of Morris *v.* Bank of England, Cas. Temp. Talb. 217; 4 Bro. P. C. 287, it has been the settled doctrine of the court, that where a decree has been obtained for payment of creditors, it is in the nature of a judgment for all; and the court, therefore, will not permit any particular creditor, by proceeding at law, to disturb that administration of the assets, which this court in the execution of that judgment for all the creditors will decree; and the court not being in the habit of taking the word of any one as to the amount of the assets or of the debts, till it has a report finding what they are, and considering that equal justice must be done to all, will not in the mean time allow any to touch the assets.

Even if the creditor has got a judgment before the decree, though he may come in and prove as such, he must not take out execution.

There are, I understand, two creditors here; one for goods sold and delivered, and another for funeral expenses; if they have obtained judgments by which the executors are personally liable, *de bonis propriis*, I have nothing to do with it; but if they are judgments *de bonis testatoris*, it certainly would be a case for an injunction. In proceeding they have gone upon a mistake, for it is well settled, that they are entitled to their costs only up to the time of their having notice of the decree.

It is said, that this practice is attended with great inconvenience to creditors; and so it is: but as long as the law allows this court to administer the estates of deceased persons, it is inevitable. If first one and then another were to be suing at law, it would be impossible to go on. It was in lord Rosslyn's time that it was first settled, that the injunction might be granted without a bill; lord Thurlow always held, that there ought to be a bill; it being his opinion, that no person could be brought into this court, except by subpœna.

It afterwards appeared to me that many unrighteous proceedings were introduced by these suits; and I therefore laid down the rule, that when the executor applied for such an injunction, he should enable the court, if in its discretion it should think fit, to order him to pay in the balance in his hands. It was then asked, why did not the creditors make the executor set forth the balance in his answer, so as to enable a motion for payment of it to be made? But the answer to that was, that the creditor was generally friendly to him, and that it was probably the common purpose of both that the money should remain in his pocket. The court, therefore, called upon him to set forth the amount.

In this case, therefore, considering that the court would carefully preserve the heir-looms, and that the executors cannot know, with sufficient certainty, what the amount of the debts is; it seems to me, that the motion would be quite of course, upon the executors making a short affidavit, as to the state of the fund. If this would be so upon the application of the executors, I think the court must have jurisdiction to do it at the instance of legatees. The executors should make an affidavit as to the assets in hand. If they have assets, they must pay the creditors their costs; if not, the plaintiffs must pay them.

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Jacob, 126.

Injunction to restrain proceedings at law for recovering an annuity secured to the wife by a deed of separation, not containing any covenant to indemnify the husband from her debts, refused.

Quære. Whether a covenant in a deed of separation not to sue for the restitution of conjugal rights is binding, and if not, whether the rest of the deed can stand.

Quære. Whether a gift of an annuity to the separate use of a married woman, on condition of her living apart from her husband is good.

March 20, 21, 22, 1820. May 24, 29, 1821.

[The Earl of Westmeath *v.* The Countess of Westmeath.]

BY indenture dated the 17th of December 1817, between the plaintiff of the first part, the defendant the countess of Westmeath of the second part, and W. Sheldon, a trustee, of the third part; reciting a deed executed in May 1812, upon the marriage of the plaintiff and defendant, by which he had covenanted to secure to her a jointure of 3000*l.* per annum out of his estates in Ireland, but that no provision had been made for the issue of the marriage; and reciting that disputes and differences had for some time past existed between the plaintiff and defendant, and had arisen to such a height that they were on the point of separating, but by the intervention of mutual friends, the defendant had consented to live and cohabit with the plaintiff, after he should have executed this deed; and reciting, that there was then issue between them one daughter only, the plaintiff covenanted to convey certain estates to the use of Sheldon, his executors, &c., for ninety-nine years, with remainder to the use of trustees for two hundred years, with remainder to the use of the plaintiff for life, with remainder to the use and intent that the defendant might in case of surviving the plaintiff receive a jointure of 3000*l.* per annum, with remainder to trustees for one thousand years, with other remainders for the benefit of the issue of the marriage, with the ultimate remainder to the plaintiff in fee. The trusts of the term of ninety-nine years were, and it was declared that the defendant had agreed to live with the plaintiff, upon the express condition, that in case it should unfortunately happen that, by a renewal of such disputes and differences as had nearly caused such separation as aforesaid, the defendant should find herself compelled to cease to cohabit with the plaintiff, or live apart from him, Sheldon should, out of the rents and profits, or by sale or mortgage, raise such annual sum as should then by the advice of their mutual friends be agreed upon, as a proper and sufficient sum for the separate maintenance of the defendant, which was to be paid as she should appoint, and in default of appointment, into her own hands for her separate use. The plaintiff agreed in that event to execute such articles of separation as were usual in such cases, and necessary for the security and comfort of the defendant, and he covenanted to permit their daughter and such other child or children as they might have between them, to be and reside with their mother the defendant, and to be educated under her care and superintendance; the trustee was empowered to raise money for their maintenance and education, by means of the ninety-nine years' term. It was declared that the term and the provision thereby agreed to be made were not to become void by reason of any subsequent reconciliation, but the payment only was to be suspended, and to be revived if at any future time any other separation should unfortunately take place; but such separation only to take place in case of ill usage or gross abuse from the plaintiff to the defendant. The trusts of the term of one thousand years were to raise portions for younger children.

By another indenture dated the 30th of May 1818, and executed in August in that year, between the plaintiff and defendant of the one part, and trustees of the other part; after reciting that the plaintiff had, at the particular instance and at the sole desire of the defendant, agreed to live separate and apart from her, and to allow to her during their joint lives, a separate maintenance for her and her child or children, the plaintiff demised several estates in Ireland to the trustees, their executors, &c. for ninety-nine years, if the plaintiff and defendant should so long live, upon trust out of the rents and profits, or by sale or mortgage, to raise 1300*l.*

per annum; and after six years an additional sum of 300*l.* per annum, to be paid as the defendant should appoint, and in default of appointment into her own hands for her separate use; and subject thereto, in trust for the plaintiff. The 300*l.* per annum was to be raised for the maintenance of their daughter, and of the child of which the defendant was then enceint; if one of the children died, 250*l.* only was to be raised, which was to cease in case of the death of both. The deed contained covenants on the part of the plaintiff for payment of the 1300*l.* and 300*l.* per annum to the trustees, that he would not intermeddle with the moneys to come to the hands of the defendant by virtue thereof; and that she should have power by deed or will to dispose of the arrears and savings of the annual payments, as well as of her jewels, and whatever other personal property she might acquire, or which might devolve upon her. He also covenanted that the defendant might, notwithstanding her coverture, live separate and apart from the plaintiff, as if she were sole and unmarried, and that she should from thenceforth be freed and discharged from the power, command, restraint, control, authority, and government of the plaintiff, and might live and reside in such place and places, and in such manner as to her should from time to time seem meet; and that he would not molest or disturb her in her manner of living, or require, or by any manner or means whatever, either by ecclesiastical censures, or by taking out any process, or by commencing or instituting any suit whatever, compel the defendant to cohabit or live with him; and that he would not for that purpose or otherwise use any force, violence, or restraint to her person, or sue or molest, or cause to be sued or molested, any person or persons for receiving, harbouring, lodging, protecting, or entertaining her, but that she might in all things live as if she were sole and unmarried, without his restraint or coercion, or that of any other person or persons by his means, privity, or procurement. There was no clause for indemnifying the plaintiff from the defendant's debts.

Subsequently to this deed, in November 1818, lady Westmeath was delivered of a son.

The bill filed in June 1819 against lady Westmeath, her children and the trustees, prayed that these deeds might be delivered up to be cancelled, or that so much of them as provided a separate maintenance for the defendant, and for the children, might be declared void, and an injunction in the mean time, the plaintiff being willing to live with and support his wife and children according to his means and station in life. It contained various allegations, tending to show that the execution of these instruments had been obtained from the plaintiff by false representations, and by undue advantage taken of his feelings. These allegations were denied by the answers, which also entered into several circumstances of conduct on the part of the plaintiff; they also stated that it had been proposed to insert in the deed of May 1818 a clause to indemnify the plaintiff from his wife's debts, but that it was omitted, in consequence of his objecting, and expressing his opinion that her prudence would render it unnecessary. It was alleged at the bar that the cohabitation had continued for some time subsequent to the execution of the deed of May 1818, but this did not appear upon the pleadings, and was not admitted.

The common injunction having issued, the order *nisi* was obtained upon the answers being filed, and no cause being shown, the injunction was dissolved. The plaintiff now moved to revive it.

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The attorney-general, Mr Horne, and sir G. Hampson, in support of the motion.

The answer having denied the circumstances stated in the bill, we must for the present rely on the nature of the deeds alone, as furnishing grounds to induce the court to prevent them from being made use of. The first deed being prepared in contemplation of a future separation, is one which the policy of the law will not permit to stand. Lord St John *v.* Lady St John, 11 Ves. 526. The second is consequential upon it, and so connected that they must be looked on as one transaction; the second is vitiated by the first. It is besides distinguished from most deeds of this description by the want of any covenant to indemnify the husband from his wife's debts; it rests therefore upon no consideration, except that of an agreement for a separation, an agreement acknowledged to be contrary to a moral duty. It is strange, as remarked by Sir W. Grant, in Worrall *v.* Jacob, 3 Mer. 268, that the covenants between the husband and trustee, being auxiliary only to an agreement contrary to the spirit of the law, should ever have been sustained; and it is shown in Legard *v.* Johnson, 3 Ves. 352, and in St John *v.* St John, that the doctrine cannot be referred to the contract between the husband and the wife; yet here there is nothing else.

Mr Hart and Mr Blake for lady Westmeath, and Mr Wetherell and Mr Shadwell for the trustees, against the motion.

The motion is now made upon a ground different from that relied on in the pleadings; the bill charging the deeds to have been fraudulently obtained; it is now taken up with a view to public policy. We may safely admit that this reasoning would apply to the deed of 1817, without affecting that of 1818, which is quite unconnected with the former; it does not purport to be made in execution of it, and does not recite or refer to it. The latter deed, therefore, stands alone, and there is no authority to invalidate deeds providing for the separation of husband and wife, if it be a separation actually existing. St John *v.* St John goes no further than to prevent prospective and executory contracts made during cohabitation in contemplation of future disagreements; we may also concede that articles for a separation would not now be specifically performed; but where there is a present separation, and the deed is executed, not resting in contract only, repeated decisions have settled that it will stand. The court is not called upon for the execution of articles; but the question is, whether it will permit the deed to continue; that depends upon whether it is good at law, and upon that point no authority can be found on the other side.

Doubts have been thrown out as to the principle upon which the law on this subject proceeds. A state of separation may, to use the language of sir W. Grant, be "unauthorized;" but it is not illegal; the law does not punish or forbid it; on the contrary, there are many instances showing that in the eye of the law it is not in itself immoral. In Todd *v.* Stokes 1 Salk. 116, 1 Ld Raym. 444, 1 Mod. 134, 1 Sid. 127, and Peirce *v.* Welden, Skinner, 323, it was laid down by lord Holt, that the husband was not chargeable for goods furnished to his wife while living apart; and the same was held in Manby *v.* Scott, 1 Lev. 4, 1 Sid. 109, 1 Roll. Ab. 351, pl. 5, where he had refused to receive her, and she was without a separate maintenance. Thus the law recognizes the separation, allowing it to vary the rights of third persons. This was carried further in the case

of King *v.* Mead, 1 Burr. 542, where it was held that the husband might, by agreement for valuable consideration, renounce the marital right to compel consortion. So in Lister's case, 8 Mod. 22, 1 Stra. 477: and again in the admission of separate property, the entirety of the marital right has been permitted to be broken in upon.

Even if in general, separations were not to be supported, yet when there has been on either side such conduct as would have insured a decree for a divorce in the ecclesiastical court, why may not the parties compromise their remedies by private adjustment, leading to the same conclusion, as if they had proceeded to litigate before that tribunal? In this case we contend, that upon the conduct of the plaintiff, lady Westmeath might have obtained a divorce and alimony; this deed gives her no more; that is, no more than what she is entitled to; if they have agreed to do that which the law deems proper, why should the matter be forced into public discussion? It can be of no advantage to the public morals, or to private feelings, that all instances of matrimonial misconduct and unhappiness should be compulsorily disclosed to the world. The plaintiff, as we contend, has forfeited his claim to the rights of a husband; the deeds, therefore, do not lead to the breach of any duties.

The objection that there is no indemnity provided, is one that the plaintiff ought not to urge, as it was at his instance that it was omitted; but the only effect of it is to render the deed voluntary as against creditors. It is obvious, that objections to the policy of the deeds apply equally, whether they do or do not contain such a clause. In Fitzer *v.* Fitzer, 2 Atk. 511, where there was no indemnity, lord Hardwicke, though always disposed to give full weight to reasons of public policy, established the covenant for a separate maintenance against the husband, distinguishing between him and the creditors, on whom it was not binding(*a*). In the late case of Bateman *v.* Ross, 1 Dow. P. C. 235, it does not appear that there was any clause of indemnity, yet the house of lords established an award providing for a separation; the defence set up was a subsequent reconciliation, and it was proved that the husband and wife had resided in the same house; this, however, was not considered sufficient to make void the award.

The separate maintenance is here granted for life, and not during the separation only. That was the case also in Fitzer *v.* Fitzer, Fletcher *v.* Fletcher, 2 Cox, 99, and Stephen *v.* Olive, 2 Bro. C. C. 90; and it makes no difference in the operation of the instrument, as in either mode of limiting the provision, it must cease upon a subsequent reconciliation. Angier v. Angier, Prec. Ch. 496. St John *v.* St John. Fletcher *v.* Fletcher.

The attorney-general, in reply, referred to the Lord Chancellor's judgment in Beard *v.* Webb, 2 Boss. & Pull. 93, and to Marshall *v.* Rutton, 8 T. R. 545. He observed, with respect to Todd *v.* Stokes, and other cases of that class, that the husband is only liable for articles furnished to his wife, from its being implied that she orders them by his authority; but if the person who supplies them has notice that she acts without that authority, the implication does not arise; in those cases the separation was only looked at as proving the party to have had notice that the wife was acting for herself. The case of Rodney *v.* Chambers, 2 East, 283, where a prospective deed of separation was supported, has been lately

(*a*) See also Head *v.* Head, 3 Atk. 542.

overruled in the exchequer chamber(*a*). This deed does not recite an actual separation, but that a separation had been agreed on; it seems, therefore, prospective in its nature. The argument on the other side, in admitting that a court of equity would not decree a specific performance of contracts of this description, admits that they are contrary to public policy; and, if so, how can they be permitted? We do not deny that suits in the ecclesiastical court may be compromised, but if one of the terms agreed on be a separation contrary to the policy of the law, the parties cannot in that respect anticipate the judgment; they must arrange their disputes upon conditions which it is lawful to contract for. The covenants are couched in terms which would extend to authorize the commission of adultery(*b*), and to prevent the plaintiff from having recourse to an action of crim. con.

The Lord Chancellor. With respect to the merits of this case, I shall say very little. It is of great importance that this question should be settled, and upon principles to which we may either deny any application, or which we may admit to be general. If the question, whether the courts would or would not act upon articles of this sort, were not prejudiced by any decisions, I should say, that I think no court ought to act on them; for whether the contract of marriage be, as it is represented by some, a civil contract only, or whether it be both civil and religious, it is one of a very peculiar nature: it is one which the parties cannot dissolve: one by which they impose duties on themselves, and by which they engage to perform duties with respect to their offspring; duties which are imposed as much for the sake of public policy as of private happiness. The circumstance that the complaint against an instrument on grounds of public policy, is made by one who was a party to it, is of no consequence; for the relief is given to the public, and not to the individual.

In St John *v.* St John, I ventured to hazard an opinion, that as the contract of marriage is indissoluble by the parties, and as the law has not contemplated any dissolution of it, except *propter adulterium*, or *propter sævitiam*, and as it has not committed to the courts of law or equity the province of ascertaining whether there has been sufficient of *adulterium* or *sævitia* to make void the contract, (although, for many collateral purposes, they may enter into that inquiry), it was quite inexplicable how courts of equity got any jurisdiction with respect to these articles. In that case, instead of leaving it to the laws of the country to decide whether they should live together or not, Mr Whitbread and the other trustees were to say: we will be the ecclesiastical court; we will determine whether the husband and wife shall live together, and whether the father shall perform the sacred duties which he owes to his children.

(*a*) Durant *v.* Titley, 7 Price, 577. See 2 Barn. & Cress. 551, where Lord Chief Justice Abbott (one of the judges who decided this case) said it was not intended to shake any former decision. It was different, he said, from all the former cases, inasmuch as the deed provided for the separation of a husband and wife, who at the time of making the deed were living together. It appears, that in Rodney *v.* Chambers the deed was made as an inducement to a reconciliation, after some differences had arisen, and the allowance was to be paid only in the event of a future separation, with the approbation of the trustees. In Durant *v.* Titley the effect of the deed was to provide a separate maintenance for the wife in the event of a future separation, leaving her at liberty to separate herself from her husband at her pleasure. See 6 East, 252.

(*b*) Sed vide Sullivan *v.* Sullivan, 2 Addams, 299.

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It is admitted here, that the first deed cannot stand for a moment. As to the recital in the second deed, it may be understood to look to a future separation, and that the only cause of it was the desire of Lady Westmeath to live apart; but I do not think the words "agreed to live separate" necessarily imply a future separation; it might have existed before. It would certainly be difficult to say, that at the sole desire of husband or wife, the courts would support a separation, if the question was unprejudiced by decisions. The argument of sir S. Romilly in St John *v.* St John was very strong; he asked if the parties could say, at the time of the marriage, that they would agree to live separate; they could not, and yet it is impossible to deny, that before the marriage they may in general contract, but that they cannot afterwards, and then will a contract be supported in the latter case which would not be supported in the former?

The jurisdiction of a court of equity must be applied to, either to carry these deeds into execution, or to prevent them from taking effect, and this cannot be done without ordering them to be delivered up to be cancelled, and in such cases there must be an intermediate order to restrain proceedings upon them. It is thus that it now comes before the court.

The first thing to be considered is the effect of the covenants; and without entering into the question whether they extend so far as the attorney-general suggested, we see that it is expressly covenanted, that the husband shall not apply to the ecclesiastical court for the enjoyment of the comforts belonging to the marriage state, or to be permitted to perform its duties. One question is, whether such a covenant will bind; and if I should send this case to a court of law, that will be one of the questions: none of the cases, I think, touch that, either in decision or in principle. But it does not rest there; for if that covenant be a part of the deed, and if reasons of public policy make void that covenant, and if the whole deed is for the same purpose, it will be difficult to support it. If the purpose be general, and be one that is against public policy, I do not see how it can stand. This, I say, supposing there to be no decision on the point. I remember the cases about marriage brocage bonds; the leading case is Shirley *v.* Ferrers, in the exchequer, where it was held, that the circumstance of the plaintiff being *particeps criminis*, did not prevent him from suing to have it set aside. Now if the marriage brocage had consisted in demising a term for the life of the person bringing about the marriage, and in the same deed he had entered into a covenant to do it, I apprehend the courts would not say that covenant was bad, and the rest of the deed good, but would set aside the whole.

Much has been said about the situation in which this court places married women; and there are many cases in which, by agreement, a married woman is, for some purposes, placed in the situation of a *feme sole;* as where she has pin-money, or a separate provision, either secured at marriage or arising from the bounty of a friend or relation. There is no doubt that a woman before marriage may contract for those rights, though it is very doubtful whether it be likely to promote domestic happiness. But it may still be a question, if a relation or a stranger gives her an annuity, on condition of her living separate from her husband, whether that would be good; and if not, the question arises whether the husband and wife can make a contract, the effect of which is the same.

It is said that it is not the fault of the defendant, that there is no covenant to indemnify the plaintiff against her debts; it is said that covenant is of no consequence, and cases were cited about the extent of the husband's

liability; but the answer to them is, that they did not go upon an agreement to live separate. It is impossible to deny that a covenant of this sort is made by parties who are capable of contracting, and it is considered to be sufficient to support the deed against creditors; but if I am asked, how is it possible that objections on grounds of public policy can be removed by these covenants, the only answer is, that if not bound by decisions, I should say it was impossible to show that it ought originally to have made any difference, whether there was or was not such a covenant. But I cannot say that it will not, for if those who have gone before me have thought that it would, I must give to it the same effect which it had upon their judgments; and from what I have heard them say in conversations that I recollect, I think it would have made a material difference with both lord Kenyon and lord Thurlow. I remember, too, conversing on the subject with lord C. B. Eyre; he said he never would have decided as he had, but for the covenant by the trustees.

With respect to the argument about the *pro tanto* separation operated by the law in some cases, it is only from a stronger policy overruling a weaker one. Thus, in the case of articles of the peace, the law says that it is a stronger policy that the husband shall not assault the wife, than that they shall live together.

It comes then to this question, whether the contract, which the law says is only to be dissolved on certain accounts, is in fact to be dissolved, not for those causes, but because the parties choose it. I say this, because I am not prejudging the question of conduct, for I have no difficulty in saying, that I do not apprehend that I have any right to try the question, whether a divorce could be obtained in the ecclesiastical court, or in the house of lords. I have no such jurisdiction.

The course I should have wished to adopt would be to have the assistance of a common law judge and an equity judge, but I fear that will be impossible in the present state of judicial business, and I must therefore grapple with all the difficulties of the case myself.

On a subsequent day, the following cases bearing on the subject were mentioned. Gage *v.* Lyster, 2 Bro. P. C. ed. Toml. p. 4; Freeman *v.* Moore, 1 Bro. P. C. 237; Lambert *v.* Lambert, 2 Bro. P. C. 18; Hobbs *v.* Hull, 1 Cox, 445; Cooke *v.* Wiggins, 10 Ves. 191; Seagrave *v.* Seagrave, 13 Ves. 439.

May 23.—Mr Blake mentioned, that the plaintiff had commenced a suit in the ecclesiastical court, for restitution of conjugal rights.

The Lord Chancellor. That leads to a most important question; whether deeds of this kind do or do not raise such an equity between an husband and wife, as to authorize this court to prevent them from proceeding in the ecclesiastical court; for unless it can be carried to that length, I do not see how they can be supported. I believe there was a case where lord Bathurst made such an order, but that it was the only one(*a*).

May 29.—The Lord Chancellor. This case comes before me upon a motion for an injunction. The bill prays to have these deeds delivered up to be cancelled, and grounds itself not only on the nature of the instru-

(*a*) See 3 Bro. C. C. 620, 2 Cox, 107, and Wilkes *v.* Wilkes, 2 Dick. 791.

ments themselves, but also on allegations as to the means used in obtaining them. I must, however, now lay these allegations out of consideration, for the answers admit nothing that would enable the court to give relief with reference to those circumstances. I must, therefore, in what I have to say, confine myself to the nature of the instruments.

His lordship then stated the substance of the deed of December 1817, and proceeded. This is not only a deed contemplating a separationto commence at a future time, but it also endeavours to avoid the effect of that doctrine, by which it has been held that a deed of separation, supposing it be good at law or in equity, shall be rendered void by any future reconciliation. It is attempted to shut out this, by the clause providing that in case of a subsequent reconciliation, the payment of the annuity shall be suspended only, to be revived on a separation taking place again. It adds, that such separation is only to take place in case of ill usage or gross abuse. This is probably thrown in, to make the deed conformable to some cases, in which the courts of law seem to have thought that they could, without going to the ecclesiastical court, try the question whether there had been that degree of ill usage, which amounting to cruelty, would be a legitimate cause of separation.

His lordship then stated the substance of the second deed, and observed, that there was not in either of the deeds any clause to indemnify the husband against the debts of the lady. It is suggested by the answers that a clause for that purpose was intended, but that in consequence of the plaintiff thinking it unnecessary, it was left out. There is not, therefore, in this case, that which in some cases has been held to support these instruments; namely, the valuable consideration of such a covenant. It is not for me to consider, whether the plaintiff ought to object on the ground of the want of this covenant, if it was omitted by his desire. But I may venture to say, that the deed having been prepared without it, the defect is one that cannot be supplied by a court of equity, for I think that a court of equity could not correct such a deed.

This is not a bill by lady Westmeath, to carry the trusts of the deed into execution. Whether, if she had filed such a bill, the court would have interposed on her behalf, is a consideration with which I have now nothing to do. The bill is by lord Westmeath, to have the deeds delivered up; and the question is, whether they ought to be set aside upon grounds of public policy.

On looking into the cases on this subject, which are extremely well collected by Mr Roper, I perceive that it seems to have struck every one as extraordinary, that such deeds should ever have been supported. The law has imposed upon husband and wife duties of the most sacred nature, which one would have supposed that no court would allow them to engage not to observe. But there are many cases, particularly since that in the first first volume of Burrow(*a*), breaking in upon the principle.

The court of exchequer chamber in the year 1819, held, that a deed could not be made providing for a future separation(*b*). There are other cases to be found which seem to intimate, that if the conduct of the husband has been such, that the wife, applying to the ecclesiastical court for a divorce and alimony, would have succeeded, a deed of separation might be supported on that ground. In a case in 8 T. R.(*c*), lord Kenyon seems

(*a*) Rex *v.* Mead, p. 542. (*b*) Titley *v.* Durant, 7 Price, 577.
(*c*) Nunn *v.* Wilsmore, p. 521. Hobbs *v.* Hull, 1 Cox, 445.

to hold that opinion, intimating that if in such a case, an estate was vested in trustees for the wife, to enable her to live separate, that would be supported, and a court of equity would administer the trust. There have also been many cases, Stephens *v.* Olive and others, where it has been held, that if there was a covenant to indemnify the husband, that consideration would support the deed.

It has always seemed to me very difficult to hold these deeds legal. It seems to be admitted, that a mere agreement to live separate, is one that would not be deemed valid; and it seems strange, as sir William Grant observes, that if the primary object be vicious, these auxiliary provisions should be held good, and thereby that which the law objects to should be carried into effect.

In this case, if either of the instruments in question be void on grounds of policy, it seems to me that they must be void at law as well as in equity, and there is no reason why it should not be tried at law. That might be done by a case: but on the part of lady Westmeath, it is urged than an injunction ought not to be granted, but that she should be left at liberty to distrain; and my opinion is, that if any action can be maintained upon these deeds, I cannot prevent it, unless I could at the hearing order the deeds to be delivered up on the other grounds. The conclusion I come to is, that though I might have decided differently if I had been one of the common law judges formerly, yet that it is impossible for me now to take upon myself to say, that these deeds are not good at law. The parties may, therefore, try the question in such manner as they may be advised, with liberty to apply. I cannot direct a case; for looking at all the decisions, it seems to me that no case can bring the question properly before the court, without its containing admissions with reference to conduct, which it would be most improper to expect(*a*).

Fereday *v.* Hordern.

Jacob, 144.

Deed by which A., B. and C., partners in trade, in consideration of 4000*l.* paid to them by D., in augmentation of their capital, agree to admit him into partnership with them for a term. It was agreed that D. should receive, in lieu of profits, a clear sum of 550*l.* per annum, and

(*a*) In Jee *v.* Thurlow, 2 Barn. & Cress. 547, the general question of the validity of deeds of separation was argued before the court of king's bench: the decision was in favour of the deed.

In a very recent case, Elworthy *v.* Bird, 29th of June 1825, 2 Sim. & Stu., 372, the bill prayed a specific performance of an agreement to execute a deed of separation securing an annuity to the wife, and indemnifying the husband from her debts. The husband, who was the defendant, put in a demurrer, which was argued before the Vice-Chancellor. His honour, in giving judgment for the plaintiffs, said it was very true as a general principle, that a court of equity would not specifically perform an agreement for a separation between a husband and wife, for, in truth, the wife was incapable of entering into such an agreement; but on examining all the authorities, it appeared to him, that although some little doubt had been suggested by some judges, on the point, it had been uniformly decided, that when trustees entered into an agreement to indemnify the husband against the debts of the wife, that was a sufficient consideration for the allowance stipulated to be paid by the husband, and courts of equity had never refused to perform such an agreement.

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all the property of the concern was charged with the payment of this sum quarterly, and of the 4000*l.* at the determination of the partnership. A., B. and C. were to pay rent, taxes, wages, and the other outgoings of the trade, which was to be carried on by them, and in their names only ; and D. was not to be required to attend to it. D. was at liberty to retire on giving twelve months' notice ; and on his retiring, or at the end of the term, the 4000*l.* and the arrears (if any) of the 550*l.* per annum, were to be paid to him by A., B. and C. by instalments, to be secured by their bonds, and they were to indemnify him from the debts of the partnership. Held that this deed was not usurious.

May 24, 1821.

BY indenture, dated the 18th of May 1808, and which was executed in October in the same year, between Samuel Fereday, J. Fereday, W. Turton and Alexander Hordern, reciting that the three former carried on the business of coal and iron masters, in co-partnership, at Tipton, in the county of Stafford, and that for the purpose of extending their concern, and in consideration of 4000*l.* paid to them by Alexander Hordern, in augmentation of their capital, they had agreed to admit him into co-partnership with them ; it was witnessed that they covenanted to become joint and equal partners together in the said trade for twenty-five years, if Hordern and any one of the others should so long live, and the trade was to be carried on at the same place, and under the same firm as theretofore, and without the addition of Hordern's name. And it was agreed that Hordern should be entitled to have and receive the clear yearly sum of 550*l.*, free from all deductions whatsoever, for property or other taxes, from and out of the said trade and concern, in case the same should or did, in any way or manner produce the same, either annually or upon the average or otherwise, for and in lieu of all further and other share, interest and proportion, of or in the gains, increase, or profits which might arise therefrom ; this sum was to be paid by four quarterly payments, and all the messuages, lands, or tenements on which the trade then was or might be carried on, were to be responsible for and chargeable with the payment thereof, and of the said 4000*l.* at the determination of the co-partnership, and also all the machines, implements and stock in trade, in and upon the premises, the book and other debts, bonds, notes, securities and other effects thereof, and the gains, increase and profits to be produced by the trade, to the full value and extent thereof, exclusively and independently, and to the entire prejudice and annihilation of, any shares, interest, right, or property of them the said S. Fereday, J. Fereday and W. Turton, therein or thereto, under and by virtue of the co-partnership then subsisting between them, or otherwise howsoever, should be liable to pay and make good the same accordingly. The premises were to be kept insured by S. and J. Fereday and Turton, and they were also to pay the rent and taxes, the wages of clerks and workmen, and the other outgoings incident to the trade. The contracts and engagements of the trade, drafts and bills, were to be in their names only ; they were alone to manage the trade, and Hordern was not to be required or obliged to attend to it further than he should think fit ; they were not to sell or mortgage any part of their shares in the co-partnership stock without his consent ; the accounts were to be annually settled and signed by them, and a copy delivered to Hordern, and the books were to be open at all reasonable times for his inspection ; the balances which upon each annual settlement should appear to be due to them, were in the first place to be charged with, and were to pay and discharge the yearly sum of 550*l.* to Hordern, and such part thereof as should then be in arrear, or otherwise due and payable by

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virtue of the deed. The other partners were not to be at liberty to take up money at interest for the purposes of the trade, without the consent of Hordern; and it was agreed that he should be permitted to retire from the concern on giving twelve months' notice, when it was to be dissolved as to him. Upon his retiring, or upon the expiration of the term, the other partners were to pay to him by instalments out of the stock in trade for the time being, or otherwise, the sum of 4000*l.* advanced by him, and the arrears which should be then due of the 550*l.* per annum: they were to give bonds with sureties to be approved of by him, for the payment of such moneys at the times and in manner and form aforesaid, and for indemnifying him from the partnership debts; and he was then to assign to them, at their costs, his interest in the partnership property. The deed contained the usual clause for referring differences to arbitration.

The sum of 4000*l.* was paid by James Hordern, the father of A. Hordern; about 3600*l.*, part of it, had been previously advanced by him at different times to S. and J. Fereday and Turton, and was owing by them at the execution of the above deed; the remaining 400*l.* was paid at that time. The annual sum of 550*l.* continued to be paid according to the stipulations of the deed, till August 1815, when Hordern becoming desirous of withdrawing from the partnership, it was dissolved as to him; and it was agreed that instead of receiving back the 4000*l.*, he should be paid an annuity of 550*l.* for two lives. A joint and several bond was accordingly prepared in the names of Samuel Fereday, Turton, and John Fereday, but was executed by the two former only, by which they became bound to A. Hordern for the payment to him of an annuity of 550*l.* for his own life, and that of one J. Corser; the annuity was to be redeemable at the price of 4000*l.* Hordern was at that time of the age of twenty-nine: Corser of the age of nine.

The bill filed by Samuel Fereday and Turton, against James and Alexander Hordern and J. Fereday, represented the advance of the 4000*l.* to have been a loan, and that by the annual payments the amount of their debt was, in August 1815, reduced to 3000*l.* The amount of the annuity secured by the bond then executed was fixed on the supposition that the debt then due was 4000*l.*, and the plaintiffs were induced to accede to it, by threats of legal proceedings, and from being in embarrassed circumstances, and ignorant of the real state of the account. The bill charged that the indenture of 1808, and the bond of 1815, were usurious, and prayed that the latter might be delivered up to be cancelled, and an injunction to restrain the defendants from proceeding upon it at law. The defendants, the Horderns, by their answers insisted that the indenture of 1808 was intended, *bonâ fide*, as an agreement for a partnership, and not as a security for a loan; and that the dissolution in August 1815, and the bond of that date were fairly arranged upon the footing of that instrument, denying that any undue means had been used.

The common injunction having issued for want of an answer, an order *nisi* was obtained to dissolve it; and a motion was made by the defendant that the arrears due might be paid into court. The case having been argued on a former day,

The Lord Chancellor now gave judgment. His lordship observed, that it was necessary to consider whether the deed of 1808 was usurious. It was stated to be usury under the device of a partnership agreement. But he thought it impossible to consider it usurious. Hordern

became a partner, and though he was not under any liability as between himself and the plaintiffs, yet he was liable for all the debts of the concern, as to all the rest of the world. He thought, therefore, that it could not be made out to be a case of usury(*a*); and the answer did not admit any other circumstances, upon which relief could be given.

Injunction dissolved.
Reg. Lib. A. 1820. fo. 2056.

Lord *v.* Wormleighton.

Jacob, 148.

To an action by a creditor, the executor pleaded *non assumpsit*, a set off, and *plene administravit præter*, and the verdict was against him on all these pleas. A decree for administration of the estate having been pronounced pending the action, an injunction was granted against the creditor on payment of his costs at law.

December 8, 9, 1820. May 31, 1821.

THIS was a creditor's suit, in which the usual decree had been pronounced. A motion was made on the part of the defendant the executor, that W. Jones, a creditor, might be restrained from further proceeding at law: the circumstances were as follows:

Soon after the testator's death, in May 1819, Jones delivered to the executor a bill amounting to 321*l.* 8*s.* 0*d.* for medical attendance. In May 1820 he commenced an action for the recovery of it; the declaration was delivered on the 16th of June. The defendant pleaded the general issue, *non assumpsit;* a set-off, and *plene administravit præter* 10*l.*; the latter plea was afterwards amended by extending the admission of assets to 200*l.* On the 15th of July, notice of trial was given for the Leicester assizes to be held the 26th of that month.

It appeared that the bill in this cause was filed on the 12th of July, the answer and replication on the 17th, and the decree obtained on the 21st of the same month. On that day, notice of the decree was sent to Jones's solicitor. The trial took place a few days after. Upon the first and second issues, the jury found for the plaintiff Jones, and, upon the third, they found assets in the hands of the executor to the amount of 321*l.* 19*s.* 11*d.*; they found damages 200*l.*, and forty shillings costs.

The motion was originally made before his honour the Vice-Chancellor, who ordered, that upon the defendant paying to Jones his costs incurred up to the time of his having notice of the decree, he should be enjoined from proceeding at law: and he declared that Jones's debt should be taken, according to the verdict obtained by him, at 200*l.* A motion was now made on the part of Jones to discharge this order.

Mr Hart and Mr Beames in support of the motion.
The rule established by the case of Terrewest *v.* Featherby, 2 Mer. 480,

(*a*) See Morse *v.* Wilson, 4 T. R. 353. Anderson *v.* Maltby, 2 Ves. Jun. 248.

is that, where the executor, by pleading a false plea, has given the creditor a right to a judgment *de bonis testatoris et si non de bonis propriis*, a decree in this court does not relieve him from the personal responsibility that he has incurred. The executor's pleas in this case have been negatived by the verdict, and therefore, according to the case referred to, he cannot, by commencing this suit, drive us to an inferior remedy.

Mr Horne, on the other side, contended, that the pleas pleaded by the executor were not false pleas, within the meaning of Terrewest *v.* Featherby. The plea of *non assumpsit*, and of the set-off, were of matters not within his knowledge; and on the third plea of plene administravit præter, he did not enter into evidence, considering it unnecessary, the subject being already embraced by the decree of this court.

The Lord Chancellor. This was argued as if it was the case of a judgment de bonis testatoris et si non de bonis propriis; but on looking into it I find that it is a judgment for the damages de bonis testatoris, and for the costs only de bonis propriis.

As to the plea of non assumpsit, I do not think that it is a false plea; if the executor merely puts in issue the fact of the debt, that is not false. I am not sure that I had not a wrong notion of this, at the time of deciding that case.

May 31.—Affidavits were afterwards filed on the part of the defendant the executor, to establish the fact that the assets in his hands did not exceed 200*l.* The matter was several times mentioned to the Lord Chancellor in his private room; his lordship was finally of opinion that the injunction should be granted, but varied the order of the Vice-Chancellor by directing the defendant to pay to Jones his costs at law, including the costs of the trial(*a*).

Reg. Lib. B. 1820, fo. 1195.

Salvidge *v.* Hyde.

Jacob, 151.

A bill for an account of a testator's estate, and also to set aside sales made by the executor and trustee, to himself and to another person, held to be multifarious.

Jan. 19. Feb. 2. May 29, 1821.

THE hearing of this case before the Vice-Chancellor is reported in the 5th volume of Mr Maddock's Reports, p. 138. The defendant Laying appealed from that decision, and now moved to set aside an attachment that had issued for want of an answer.

Mr Hart and Mr Beames in support of the motion.
Mr Horne and Mr Stuart on the other side.

The Lord Chancellor observed, that as he understood it, two of the plaintiffs were persons interested in the residue, and two of them creditors;

(*a*) See Fielden *v.* Fielden, 1 Sim. & Stu. 255.

one of the defendants is a trustee for sale, and the bill brings before the court persons claiming under distinct contracts. But is it not the course of practice, to state that there are contracts, and then for the court to refer it to the Master to inquire whether it is proper that they should be carried into execution? and if not, each must be the subject of a separate suit.

It was agreed that the attachment should be stayed, and his lordship directed the appeal to be set down for hearing.

Feb. 2.—The appeal came on to be heard this day.

For the defendant. The bill seeks a general account of the testator's estate, and also to set aside a sale made by Culliford the trustee, to himself, and a sale of another part of the estates to the defendant Laying. The latter is thus implicated in the accounts, and the distribution of the residue, with which he has no concern. It is equally improper to make his purchase, and that of Culliford, the subject of the same bill. Being distinct purchases, they cannot be joined together. Brooks *v.* Lord Whitworth, 1 Mad. 86; Rayner *v.* Julian, 2 Dick. 677. The Vice Chancellor was of opinion, that as the general administration of the estate could not be completed without a settlement of the question as to their purchases, they were necessarily united together. But it does not follow that because a particular object cannot be affected without first disposing of another, that a party interested only in the first is to be mixed up in the litigation of the second. In Whalley *v.* Dawson, 2 Sch. & Lef. 367, Lord Redesdale allowed a demurrer to a bill praying a partition, and also to set aside a lease granted by one of the tenants in common, though it was urged that, till the lease was got rid of, the partition could not take place.

For the plaintiffs. The object of the bill is the single one of executing the trusts of the will. The defendant Laying having entered into the contract under circumstances, amounting, according to the case made by the bill, to a fraud, is also to be considered as a trustee for the plaintiffs; they have a right to have all the trusts performed in one suit, and how can he object to be joined in it, having mixed himself up with the subject of it? To have filed two bills would not have lessened the expense or delay, for the parties must have been the same; and as against Culliford the trustee, it would have been objectionable to split the demand, and call on him to execute his trust partly in one suit, and partly in another. The defendant Laying is in possession of the estate, and is committing waste(*a*); a bill was therefore necessary; the matter could not have awaited the result of inquiries. The land sold to Culliford was, in fact, included in that sold to Laying, so that these purchases are necessarily connected.

The Lord Chancellor. If Culliford purchased for himself, which he could not do, and then Laying bought of him, that would be one thing; but what charge is there in the bill that Laying purchased what Culliford bought? If an executor having a power to sell, agrees to sell to A. B., can a bill be filed against him, and also for a general administration of the estate? He may have made infinitely too good a bargain with the trustee to sell, one that the court would not allow to stand, but that is no ground for making him a party to the general administration.

The case must depend on the charges of the bill: they may be such as

(*a*) The bill contained a charge to this effect

to unite persons who are ordinarily disunited. When there are trustees to sell, and a bill is filed against them, it is not usual to make the purchasers parties, but to state the contracts and pray an inquiry. There may be cases which cannot be delayed till those inquiries can be made, on account of injury that may be done in the mean time; and this may come under that head.

May 29. The Lord Chancellor allowed the demurrer(*a*).
Reg. Lib. B. 1820, fo. 1966.

Barrett *v.* Tickell.

Jacob, 154.

Injunction, in a case of account dissolved so far as it extended to stay trial, where the defendant being of unsound mind, the answer was put in by a guardian unable to give a full discovery.

A defendant of unsound mind answering by a guardian unable to give a full discovery, on a motion to dissolve an injunction, affidavits cannot be read by the plaintiff to prove facts that might be given in evidence at law.

Exception to the rule against reading affidavits in support of the common injunction, extends only to documents of which the defendant is ignorant, not to facts and circumstances.

June 4, 1821.

THE plaintiff had been for some years employed as traveller by Hugh Tickell, and the defendant Charles Tickell, and was in the habit of receiving and paying money for them, by which means a running account arose between them. In August 1820, they commenced an action against him, and held him to bail upon the affidavit of Hugh Tickell. Hugh afterwards died, and the action was continued by Charles. The bill was filed against Charles Tickell, and Joseph Tickell his brother, who had for about a year had the management of the business, and was alleged to be a partner, for an account and an injunction, representing that the accounts had been irregularly kept, that the vouchers were in the defendant's possession, and that the balance was in the plaintiff's favour. Hugh Tickell died intestate, and no one had administered to him. Charles Tickell having become lunatic, but no commission having been taken out, Joseph Tickell was assigned as his guardian, and put in an answer in that character, and also for himself. He conducted the action in the name of his brother. It appeared that at the time of filing the bill the action stood for trial, and there had been some treaty with a view to a reference to arbitration, which had gone off. The common injunction had issued; and had been extended to stay trial; on the coming in of the answer, the order *nisi* for dissolving it was obtained.

Mr Wetherell and Mr Tinney, now showed cause upon the merits, and proposed to read affidavits to prove admissions, alleged to have been made

(*a*) Exeter College *v.* Rowland, 6 Madd. 94. Knye *v.* Moore, 1 Sim. & Stu. 61. Dew *v.* Clarke, ibid, 108. Turner *v.* Robinson, ibid. 313. 6 Madd. 94. Shackell *v.* Macauley, 2 Sim. & Stu. 79.

by Charles Tickell as to the state of the accounts, which they contended were admissible, the answer neither admitting or denying these allegations.

Mr Hart and Mr Rose for the defendants objected.

The Lord Chancellor said, he had known affidavits made to verify deeds, instruments, or letters, where the defendant did not know any thing about them; but he thought they could not be admitted to prove other facts(*a*). With respect to the declarations of Charles Tickell, nothing can be got at from the defendants; but if the plaintiff can prove them, he might give them in evidence at the trial.

On the part of the plaintiff it was contended, that in the case of an open account, where from mutual confidence regular entries had not been made, and where the documents were in the defendant's possession, the action ought to be restrained; particularly as it was carried on by one person in the name of another, who was incompetent to give to the plaintiff the disclosure that he was entitled to; that Joseph Tickell was made a party on the supposition that he was a partner, which it now appeared that he was not, and that having only lately been employed in managing the business, he was ignorant of the chief part of the transactions in question, and thus the plaintiff had not the benefit of any discovery.

On the other side it was argued, that the plaintiff could not complain of the irregularity of the accounts, which was attributable to his own neglect of his duty as an agent; that the only answer which, according to the practice of the court, the plaintiff was entitled to require, had been put in; the debt was also sworn to by Hugh Tickell in his affidavit to hold to bail. If the name of Charles Tickell was improperly made use of in the action, the court of law had power to interfere. They were willing to consent to a reference or any other mode of settling the account, but desired to proceed to obtain a judgment at law, to stand as a security for the balance.

The Lord Chancellor. The case certainly has peculiarities which make it unlike any other that I remember. As I understand it, Hugh and Charles Tickell carried on business together as partners; Barrett was their traveller. I lay out of my consideration, whether they or he were bound to have kept the accounts of these transactions. In the lifetime of both of them, he is held to bail on the affidavit of Hugh, and though his making that affidavit is not to be too much pressed, yet it is a circumstance not to be disregarded. The action having been brought in the name of both, Hugh dies; it is then carried on by Charles as the survivor, and it proceeds till it is ready for trial, no bill in equity being then filed; propositions are made for a reference, which go off, under what circumstances it is not material to consider; but it is clear that at the time when the action was ready for trial, no bill was filed.

Charles Tickell then becomes a person of weak mind, and is admitted to answer by guardian, in the only way in which he can answer. Under these circumstances, the plaintiff can certainly have no discovery from Hugh, for he is dead; he can have none from his representatives, for he has none; he can have none from Charles, for in his state of mind he is unable to disclose any thing. On the other hand, there is Joseph Tickell, who seems to have been employed by these persons to manage the business for them.

(*a*) See Taggart *v.* Hewlett, 1 Mer. 499. Morgan *v.* Goode, 3 Mer. 10. Jefferys *v.* Smith, 1 Jac. & Walk. 300.

[Barrett *v.* Tickell.]

The ground on which I declined receiving the affidavit is this, that if the circumstances stated in them be true, it appears to me that though they cannot be established by the admission of the defendants, they may be given in evidence at the trial; and I do not recollect that the exception to the rule as to affidavits has been carried further than this; that if deeds or letters be stated in the bill, and the defendant says he does not know whether the statement is correct or not, then you may verify them by affidavit; but as to facts and circumstances which the defendants do not know of, if you cannot have the benefit of them from the defendants' consciences, you cannot have the benefit of them at all, except so far as you may be able to prove them at the trial.

Under all these peculiar circumstances it seems to me that the fairest way will be, that, having a full production of all documents, they should go on to trial; and after the trial, a motion may be made to dissolve the injunction. As to whether execution shall be stayed or not, a great deal may depend on what passes at the trial, and, therefore, I think they ought not to be allowed to take out execution by surprise; they must apply for the leave of the court(*a*).

Pearse *v.* Baron.

Jacob, 158.

Articles for a settlement, with a power of leasing for 21 years, and other usual powers, &c. do not authorize the introduction of a power of granting building leases for longer terms.

Rolls.—June 5, 1821.

BY the articles made in 1818, with the approbation of the court, upon the marriage of R. Lethbridge and Elizabeth his wife, the latter being then an infant, and a ward of the court, it was stipulated that a settlement of certain premises should be executed, which was to contain a power of leasing for twenty-one years in possession, a power of sale and exchange, of appointing new trustees, "and all such other powers, provisos, clauses, covenants, and agreements, as are usually inserted in settlements of the like nature."

The lady having attained twenty-one, the settlement was about to be executed; and a petition was now presented, praying a reference to inquire whether it would be for the benefit of the parties, that a power should be inserted for granting building leases: the situation of the premises, near the Waterloo Bridge, was such as to render them extremely valuable for the purpose of building.

Mr Ching in support of the petition.

The Master of the Rolls was of opinion, that the general words were

(*a*) In general, the order to stay trial will not be discharged separately. Earnshaw *v.* Thornhill, 18 Ves. 185. Bishton *v.* Birch, 2 Ves. & Bea. 40. But under particular circumstances it is sometimes done. See Royal Exchange Assurance Company *v.* Barker, 1 Ves. & Bea. 367. *n.*, and the cases in the exchequer collected in Eden on Injunctions, p. 76.

of no effect, as opposed to the mention of a particular term of years, for which there was to be a power of granting leases. You cannot reform and alter the contract, on the faith of which the marriage took place, because, from the altered circumstances of the property, it has become more desirable to grant leases for a long term than a short one. The articles are completely binding, and the only question is, whether there are any words to let in this power, which I think there are not.

Toosey *v.* Burchell.

Jacob, 159.

Leave given upon petition, to the purchaser of the interest of a party to attend the Master in making inquiries directed by the decree.

June. 21, 1821.

UNDER the decree in this cause, the accounts of the estate of E. Storace, deceased, had been taken, and by an order made on further directions, the Master was to inquire who were the children of E. Toosey (in whose favour the will contained a bequest) and who were the persons entitled to the residue. W. F. Toosey, one of the plaintiffs, having sold and assigned his interest in the fund, the purchaser now petitioned for leave to attend the Master in making the inquiries. W. F. Toosey had since taken the benefit of the insolvent debtor's act.

Mr Sugden, for the petitioner.

Mr Norton opposed the petition, stating, that the validity of the assignment was disputed on the ground of its having been obtained by undue means, and for an inadequate consideration, and contending that the petitioner, not being a party to the cause, could not regularly obtain leave to attend the Master, without filing a supplemental bill to establish his right, which the plaintiff would be ready to meet(*a*).

The MASTER of the ROLLS made the order as prayed, saying that it must be qualified so as not to prevent the plaintiff from having any remedies that he might be entitled to against the assignment, and that it must be at the expense of the petitioner.

His Honour doth order that the said petitioner W. F. be at liberty to attend the said Master upon the several inquiries, directed by the said order of the 6th day of June 1821; and it is ordered that the solicitor for the plaintiffs do, from time to time, give notice to the petitioner of all proceedings to be had and taken in the said Master's office, and otherwise, in and about the suit, until the further order of this court, the petitioner by his counsel undertaking to pay the costs of all parties, and of the assignees of the plaintiff W. F. T. of this application, to be taxed, &c. and that the same be paid by the said petitioner; and this order is to be without prejudice to the rights of the parties to this suit, and also without prejudice

(*a*) See Foster *v.* Deacon, 6 Mad. 59.

to the right of the assignees of the plaintiff W. F. T., to dispute the validity of the assignment in the said petition named.

Reg. Lib. B. 1820, fo. 1427.

Ex parte Hall, in the matter of Legard.

Jacob, 160.

Committee of a lunatic neglecting to pass his accounts and retaining balances, charged with interest, on the petition of a creditor.

Importance of providing for payment of the creditors of a lunatic, in order to protect him from arrest.

June 23, 1821.

THIS was a petition by one of the creditors of a lunatic, praying that the committee might be charged with interest on the balances in his hands. Upon a former petition presented by the petitioner, a reference had been directed to take the committee's accounts, which was still pending. It appeared that the committee had not passed his accounts for several years, and had retained balances in his hands.

Mr Wetherell, in support of the petition.

Mr Horne, against it, urged that the former petition had not prayed for interest, that the accounts were still proceeding, and that no objection was made on the part of the next of kin, the persons most interested; with respect to the balances, he desired an inquiry under what circumstances they were retained.

The Lord Chancellor. Nothing is of more consequence than to protect the person of the lunatic, by providing for the payment of his creditors, as far as it can be done; it being in the power of any of them to arrest him.

In this case a petition was presented, and upon it a reference was directed, pending which this application is made. When the former petition was presented, it was not known what the accounts were; it could, therefore, only pray that the accounts might be taken, and in the course of taking them, it appeared that there were large sums in the committee's hands; and it is now prayed that he may be charged with interest upon them. Now it is quite competent to him to say in answer, if he can, that he retained those sums under circumstances making it unfit that he should be called on for interest. But *primâ facie*, where his accounts have not been passed for several years, and he has had balances in his hands, it is a case for interest. I think, therefore, that he must be charged with interest, unless he can show by affidavit any circumstances to excuse him.

Ex parte Watson.

Jacob, 161.

Petitions in the matter of a person found an idiot must be served on the attorney-general.
June 26, 1821.

THIS was a petition in the matter of a person found an idiot by inquisition.

The Lord Chancellor, observing the nature of the finding, said that the petition ought to be served upon the attorney-general.

Mr Barber in support of the petition, mentioned that former orders had been made upon petitions in the same matter, without this service being thought necessary.

The Lord Chancellor. Then those orders must have been made upon the supposition that it was a case of lunacy. In all probability the crown will not take advantage of it, but to keep the practice regular, notice should be given.

Ex parte Norrish.

Jacob, 162.

The court has no jurisdiction on petition in the case of a friendly society, where they have ceased to act on the rules allowed and filed pursuant to the statute.
Rolls.—July 12, 1821.

THIS was a petition under the statute of 33 Geo. 3. c. 54, praying that J. Petrie, late one of the trustees of a friendly society, might be ordered to transfer and pay over some funds in his hands, to a new trustee appointed in his stead. The society had been formed in the year 1795; the rules had afterwards been altered, and in the year 1813, they were allowed at the quarter sessions, and filed with the clerk of the peace, pursuant to the act. Soon after that time, some dissatisfaction with the conduct of the officers had arisen, and a committee was appointed for the regulation of the affairs of the society. It appeared that since that time the rules had not been attended to; meetings had not been held, or payments made, and officers had not been regularly appointed. Petrie stated that the new trustee had not been chosen according to the rules, and imputed to the other parties various acts of extravagant waste of the funds.

Mr Barber, for the petition.
Mr Parker, against it.

The Master of the Rolls said, that it was a great misfortune to these

[Ex parte Norrish.]

societies, that they were in the habit of deviating from their rules. Here, since the year 1813, they had ceased to act upon the rules that had been registered; and had proceeded upon a different plan. What had been done since, had been done by agreement, and not under the regulations. They had become dissolved; and the court had no longer any jurisdiction under the act; if any relief could be given it must be upon bill.

Petition dismissed.

Hill *v.* Kirwan.

Jacob, 163.

On a cause standing over for want of parties, the plaintiff is in general to pay the costs of the day, although the objection be not noticed in the answer. *Semble.*

Rolls.—July 24, 1821.

THIS cause coming on to be heard, an objection was taken for want of parties, which upon argument was allowed, and the cause was therefore ordered to stand over; the question was whether the plaintiffs should pay the costs of the day. The objection was not noticed in the answer.

Mr Shadwell and Mr Garrett, for the plaintiffs, cited Mitchell *v.* Bailey, 3 Madd. 61, where it was held by the Vice-Chancellor, that if the answer did not state the objection, the defendant was not entitled to the costs of the day.

Mr Agar and Mr Combe, on the other side, contended that the rule of giving the costs of the day did not admit of any exception in the case of the answer not stating the objection. Formerly bills were often dismissed for want of parties, till the case of Green *v.* Poole, 4 Bro. P. C. 122, Ed. Toml. vol. v. p. 504; in that case the court of exchequer having dismissed the bill, the house of lords reversed their decree, and gave leave to amend on payment of costs; and in Stafford *v.* The City of London, 1 P. W. 428, 1 Stra. 95, and Jones *v.* Jones, 3 Atk. 110, the rule of making the plaintiff pay costs when indulged with leave to amend, is laid down without qualification.

The Master of the Rolls. If there were no authority upon this point, how would it stand upon principle? I should have thought that it was at least in the power of the court to give the costs of the day, for it is an indulgence to permit the cause to stand over with leave to amend, and an indulgence may surely be granted on terms. The practice of not dismissing bills for want of parties was settled by a case before Sir J. Jekyll, in which there was an appeal(*a*), and by the decision of the house of lords in the case cited. There they seem to have thought that the leave to amend ought to be accompanied with an order for the plaintiff to pay the costs of the day.

As to the necessity of the defendant stating the objection, whose business is it to take care that the pleadings are in a correct state? It is the

(*a*) See 3 Atk. 111.

business of the plaintiff: he ought to know his own case, and frame his bill accordingly. It is clear that the costs are incurred by the mistake of the plaintiff; and is the defendant to suffer because he has not pointed it out? It does not follow that the parties would have been added; here it was argued that it was not necessary to add them. The house of lords seem to have considered the payment of costs as the ordinary practice, and lord Hardwicke speaks of it in that way in Jones *v.* Jones; so also in the case cited from Peere Williams. I should be disposed to say that it is in the discretion of the court, and that unless there be particular circumstances, the plaintiffs ought to pay the costs of the day. But in deference to the authority mentioned, I will consider it before I decide.

Mr Shadwell then declined pressing the point further, and the usual order was made.

Donovan *v.* Fricker.

Jacob, 165.

A purchase being set aside for fraud, and the purchaser decreed to pay an occupation rent, receiving back his purchase-money with interest, there being a considerable excess of the rent above the interest, annual rests directed to be made in the accounts, until the excess of the rent should liquidate the principal.

Rests not necessarily directed in accounts against mortgagees.

Rolls.—July 30, 31, 1821.

THIS was a bill by the assignees of R. Kennett under the insolvent act, against Daniel Duff his assignee under a previous commission of bankrupt, and against G. Fricker and J. Henderson, to set aside an agreement for a lease, and an assignment from Duff to the latter. It appeared that Kennett was possessed of two leasehold houses, one in Bond street, and the other in Albermarle street; the former was demised by him to the defendants, Fricker and Henderson. After his bankruptcy, his assignee Duff, in June 1804, agreed to demise the other house to them for twenty-one years; he afterwards, in April 1809, sold and assigned to them the bankrupt's interest in both houses. The bill charged inadequacy of consideration, and other circumstances affecting these transactions with fraud. The defendant Duff did not appear.

By the decree pronounced at the rolls on the 19th of December 1814, it was declared that the agreement for a lease, and the assignment ought to be set aside; the Master was directed to set an occupation rent upon the house in Albemarle street, from the commencement of the term to the time of making his report, with which the defendants Fricker and Henderson were to be charged, and also with the rent due for the house in Bond street under the former lease. They were to be allowed for lasting repairs, and substantial improvements, and were at their own expense to reinstate as a private house, one of the houses which they had converted into a shop. An account was to be taken of what was due to them for the sum of 1100*l.* paid by them as the consideration for the assignment, with interest at the rate of 5*l.* per cent; and what should be found due from them was to be deducted from what should be found due to them, and the

[Donovan *v.* Fricker.]

difference to be paid by the plaintiffs; if the defendants should appear to have been overpaid, they were to repay the excess to the plaintiffs. They were to re-assign the premises, and to pay the plaintiffs costs(*a*).

The plaintiffs now presented a petition of rehearing, praying that the Master might be directed to make annual rests in the account, so as to apply the excess of the rent above the interest, which was considerable, in reduction of the principal.

Mr Wingfield and Mr Wrottesley, for the plaintiffs.

The defendants were in possession as purchasers under a contract void on the ground of fraud; the situation to which theirs is most nearly assimilated, is that of mortgagee, and the account ought therefore to be taken on the same footing as against a mortgagee in possession. And in the case of a mortgagee, where the rent exceeds the interest, the excess is applied in sinking the principal, and for that purpose annual rests are directed. Robinson *v.* Cumming, 2 Atk. 410; Shepherd *v.* Elliot, 4 Madd. 254. See also Trimleston *v.* Hamill, 1 Ball and Be. 377. The same rule ought to prevail in this case. In Todd *v.* Gee, 1 Swan, 255, a vendor having retained the possession improperly after payment of part of the purchase-money, was decreed to pay interest on the rents and profits which he had received.

Mr Heald and Mr Merivale, on the other side, referred to Davis *v.* May, Cowp. C. C. 238, 19 Ves. 383, and argued, that on a decree for redemption, the direction to make rests was not of course, but was only given in special cases, and was not extended beyond mortgage accounts: no case like the present had been found where rests had been made.

The Master of the Rolls. It being admitted that the sale to the defendants cannot stand, the only question is whether the account was properly directed. An occupation rent was to be fixed, and the 1100*l.* paid by the defendants was to be restored to them with interest at 5*l.* per cent. But to take the account in that way, it is said, does an injustice to the creditors, for that if the annual excess of the occupation rent above the interest was applied to the reduction of the principal, the consequence would be, that in a few years the whole would be paid off, and then, from that time, the defendants would have to account for the rent without any counterdemand of interest.

No case has been cited exactly similar. We must take it, that the defendants entered into possession without title, and if we were to compare it with what would be done in such a case at law, the plaintiffs would there have an action for use and occupation, and would recover the value of the rent without interest; and on the other hand, the defendants, if they could get back the 1100*l.* would not recover interest upon it, there being no contract for interest. Then if we give interest at 5*l.* per cent to the wrongful purchaser, can we refuse to charge him with interest on the rents, and thus in effect give him interest on his purchase money after the whole of it has been repaid to him? Looking at it independently of the authorities, the rent, if applied to reduce the principal, would gradually sink the whole of it. Now this rent belonged to the plaintiffs, and ought to have been paid to them: the defendants kept it, and had the benefit; then are they to go on receiving the same amount of interest, while they

(*a*) Reg. Lib. A. 1814, fo. 1743.

have this fund in their hands? Without supposing any fraud, but considering that restitution is to be made on each side, justice requires that the one debt should be set off against the other.

With respect to authority, in the first place it is always usual to charge interest in cases of breach of trust, and if the defendants are affected with a trust, they must be liable to the consequences. In the next place, this is closely analogous to the case of a mortgagee, excepting that the latter is more favourably situated, as he enters rightfully. It is said that mortgagee's accounts are not always taken with rests, and I believe the proper course is for the Master not to make rests unless the court directs it, and the court does not necessarily direct it. Thus rests were not made in the case of Davis *v.* May, where the defendant had suffered from the non-payment of the interest, and so if the excess of the rent above the interest is very small. Here, however, the excess appears to be considerable, the value of the houses being much more than 55*l.* per annum, and the interest was not in arrear. The excess being considerable, appears to have influenced the court in Fulthorpe *v.* Foster, 1 Vern. 476. The case of Todd *v.* Gee was not exactly like this: the vendor there kept possession of the estate and of the purchase money, at the same time resisting the performance of the contract. It seemed to me that he ought to be put in the same situation, as if he had completed it at the time when he ought to have done so. On the same principle I go here. The defendants have got possession of the plaintiffs' estate; the plaintiffs ought to have had it, and on the other hand the defendants ought to have had the money: this is now to be set right, and it appears to me that the plain justice of the case is, that the excess of the rent ought to be set off annually against the principal. But it does not follow that the defendants are to pay interest upon interest after the annual rent has liquidated the whole of the principal: after that it becomes merely an account of the occupation rent, which is to be taken without interest. The petition does not pray more, only desiring that the excess of the rent may be applied to reduce the principal till it is paid off.

Turner *v.* Harvey.

Jacob, 169.

Relief given against a contract where the purchaser knew that the vendors, the assignees of a bankrupt, were ignorant of a circumstance considerably increasing the value.

The purchaser is not bound to give the vendor information as to the value of the property, but a very little is sufficient to affect the application of this principle.

A contract improvidently entered into by a trustee will not be cancelled, but the court will not execute it.

August 1, 1821.

BY the marriage settlement of H. Jenkin, an estate in the county of Lincoln was settled, subject to a mortgage for 400*l.* upon himself and his wife for their lives respectively, and after their deaths, upon trust to be sold, and the money arising from the sale, after discharging the mortgage, and paying another sum of 500*l.* was to be divided among the children of the marriage; their shares to be vested at twenty-one if sons, and if daugh-

ters at twenty-one or marriage. There were several children of the marriage, one of whom only, Rebecca Ann, attained twenty-one ; she married R. Everitt, who in the year 1805 became a bankrupt ; the plaintiffs were appointed his assignees.

At the time of the bankruptcy Mrs Everitt was alive : and the plaintiffs became entitled in her right to a vested interest in the surplus of the money to arise from the sale, subject to the contingency of her surviving her husband, to the provision to be made for her out of it, and to the life-interests of H. Jenkin and his wife ; they were of advanced age, and not likely to have other children. Mrs Everitt was stated to be at that time in good health, and was thought to be likely to survive her husband.

In the month of October 1807, the defendant applied to the plaintiffs, stating himself to be instructed as solicitor to H. Jenkin, to treat with them for the purchase of the bankrupt's interest in the produce of the estate in question. They required as the price, first 250*l.*, and afterwards 260*l.*; a few letters passed between them, and the treaty went off. In the month of October 1808, the defendant agreed in the name of one G. Whitely, with the plaintiff Turner for the purchase of the bankrupt's interest for the sum of 280*l.* ; the contract was made subject to the approbation of the other plaintiff, and to the consent of the creditors, which were afterwards obtained ; the name of Whitely was used in this transaction for the defendant, who was the real purchaser. The plaintiffs subsequently found that Mrs Everitt had died in the previous July, and they filed the bill for the purpose of having the agreement set aside, alleging that the defendant was aware of this circumstance, which was material, as enhancing the value of the property, and that he had concealed it from them. The defendant admitted his knowledge of the fact of Mrs Everitt's death, and that in his conversations with the plaintiffs and their solicitor he had not mentioned it, but he conceived that they must or might have known of it, it having been announced in the public papers. The circumstances attending the contract are detailed in the course of the Lord Chancellor's judgment. It was calculated by an actuary, that at the time of the contract the property was worth about 600*l.*

The cause was heard in November 1813, before his honour the then Vice-Chancellor, who dismissed the bill. It now came on upon appeal from that decree.

Mr Horne and Mr Shadwell, for the plaintiffs.

The defendant at first introduced himself to the plaintiffs as solicitor for Jenkin, whom he represented to be desirous of purchasing ; in his first letter he inserts some intimations with a view to depreciate the property. The price then named was 260*l.* A few months after, by the death of Mrs Everitt, it was discharged from her equity, and from her chance of survivorship. By this event, of which he was aware, the value was at least doubled, and he then applied to purchase, using for the purpose of concealment the name of Whitely, who in fact had no concern in the matter. The price agreed on being 280*l.* only, must have convinced him that the assignees were not aware of the alteration of the circumstances. He gave no information of it, though well acquainted with the state of the family. In the advertisement for the creditors, the receipt written by himself, and in his letters, no allusion is made to it, but the reversion in question is still spoken of as the bankrupt's interest in right of his wife. If this concealment in a common case would not amount to a fraud, greater

weight must be given to it, where the vendors are trustees, who, as he must have known, were entering into an improvident contract, and were under a mistake as to the nature of what they were selling. In Evans *v.* Llewellyn, 2 Bro. C. C. 150, 1 Cox, 333, a deed was set aside as improvidently entered into, by persons uninformed of their rights, though without any actual fraud or imposition.

Mr Hart and Mr Treslove, for the defendant.

The death of Mrs Everitt having been publicly advertised, it cannot be assumed that the plaintiffs were ignorant of it: still less can it be assumed that the defendant supposed them not to have been informed of it. But even if he did, no fraud can be imputed to his conduct. The treaty did not proceed upon the footing of any confidence being reposed in him. They dealt as parties are always at liberty to do, openly and adversely, and were not bound to make any communications of what either of them might happen to know. A man may, as laid down by Lord Thurlow, 2 Bro. C. C. 420, deal for an estate under which he knows that there is a mine, without informing the vendor of it. Where there is no deception, and no concealment of what ought to be communicated, there is no fraud. It is said that the plaintiffs are trustees, but that circumstance furnishes no reason why they should not be bound by a contract fairly entered into. If the contract were so improvident as to be deemed a breach of trust, the court might refuse to execute it, but could not on that ground order it to be cancelled.

The Lord Chancellor. Few cases turn on greater niceties than those, which involve the question whether a contract ought to be delivered up to be cancelled, or whether the parties should be left to their legal remedies. I was surprised at hearing it argued that this is a case in which a specific performance could be decreed; for nothing appears to me more clear than that it could not. Indeed the circumstance that the contract was made so long ago as the year 1808, and that a bill has been filed to have it delivered up, operating as a provocative to the defendant to file a bill to have it performed, and the circumstance of his not having done so, show it to be a case in which no one could advise him to take that course.

The decree does not go so far as to declare the defendant entitled to a specific performance; it only says, that at the instance of the plaintiffs, the court will not deal with the case for the purpose of directing the repayment of the purchase-money and interest, and of ordering the agreement to be delivered up to be cancelled. It amounts to this only, that the parties are to be left to law.

The case is this. By the settlement on the marriage of Jenkin, an estate was conveyed to trustees, and after the death of the husband and wife it was to be sold, and the surplus of the purchase-money, after paying certain charges, was to be paid to the children of the marriage. The state of the family was this: there were three children besides Mrs Everitt; the three others died, and she thus became entitled to the whole sum, subject to the life interests of her father and mother, and to the contingency of their having more children. She married Everitt, and it appears in evidence, that at the time of his bankruptcy, his health was not in so good a state as hers, and it was most likely that she would survive him. On his bankruptcy, his assignees became entitled to whatever he would have taken in her right; that is, they would be bound to make a settlement on her and her issue, and they took subject to the chance of her surviving him, and

the property falling into possession afterwards; and it is clear that they could only sell subject to these claims(*a*).

This being so, the first transaction is the treaty by the defendant on behalf of Jenkin, and I will take that to have been *bonâ fide*, and that he was really acting for Jenkin. It seems he was the family attorney. On the 29th of October 1807, he writes this letter to the plaintiff's solicitor, and to be sure any representations he makes as to the nature of the interest may be very wisely, cunningly, and astutely put; but certainly they cannot be disregarded here. He says: "Sir, Mr Jenkin of Long Sutton has directed us to apply to you relative to the claim which the assignees of Mr Everitt have set up to his supposed interest in an estate at Sutton, in consequence of his marriage with Miss Jenkin. From a perusal of the settlement on the marriage of Mr and Mrs Jenkin, it appears that Mr Everitt's interest, if he has any at all, is so remote and contingent as to be worth very trifling."

Now I cannot suppose the defendant to be so grossly ignorant as not to know that it was something more than a supposed interest. He speaks of it as being of trifling value; language which he could not use afterwards when the wife was dead; he must have known that the bankrupt would be absolutely entitled, subject to the life interests of the father and mother. The letter then proceeds to say, that Mr Jenkin wishing that Everitt should try his fortune again in business, was willing to give the assignees a reasonable compensation, and hopes that they will not press too hard upon an unfortunate individual. It is signed in the name of the defendant and his partner. This matter seems to have soon dropped.

In July 1808 the wife died; the defendant knew this before October; and I must take it that he knew that the assignees were then entitled, subject to no claim to deduction, but subject only to the life interests of Mr and Mrs Jenkin. In the month of October he agreed to purchase it; the agreement was one that was of necessity subject to the consent of the creditors, and it was expressly understood that it was not to be binding without that consent. Accordingly a meeting of creditors was advertised for the 12th of November, "to assent to or dissent from the said assignees selling and conveying the said bankrupt's interest in right of his wife to certain money under the marriage settlement of H. Jenkin and Ann Jenkin, the father and mother of the said bankrupt's wife." The meeting was held under this advertisement, and all proves that what they were dealing about was considered to be the interest of the bankrupt in right of his wife. The defendant could have no title under the agreement without seeing these proceedings, from which he would see what was supposed to be the nature of the interest intended to be sold.

In the month of December he sends a check for the 280*l.*, (and certainly there was some worldly prudence in sending the money) and with it a form of a receipt to be signed by the assignees; not apprising them that he had himself any thing to do with the purchase, but using the name of Whitely. The receipt is in these terms:—"Received on the of December 1808, of Mr George Whitely, by payment of Mr Harvey, 280*l.*, being the purchase money for the said bankrupt's right and interest under the marriage settlement of Mr and Mrs Jenkin, agreed to be sold to him on the 25th day of October last, subject to the life-interest of Mr and Mrs Jenkin therein; the assignees to show title at their expense under the bank-

(*a*) See Mitford v. Mitford, 9 Ves. 87.

ruptcy, and transfer the said bankrupt's interest to Mr Whitely, or as he shall direct, at his expense, whenever requested."

It is not immaterial in cases like this to attend to the description of the property to be sold; for if one man understands an expression in one sense, and another in a different sense; though the court must impute to both that they understood it in the right sense, yet if there has been any mistake, and especially if the expression used by one party has at all misled the other, it is always material in considering what a court of equity will do with the case. The condition that the assignees were to show title at their expense is also material, for being the family attorney, and, therefore, conversant with the settlement, he must have known that the title would be shown at once, if it was the title of the daughter, and depended merely on the settlement and the commission of bankrupt. But if he knew of any thing else that would be necessary, there was a degree of prudence in providing that the expense of it should not fall upon himself. And he gives a sort of explanation of this in a subsequent letter, in mentioning that administration to the wife must be taken out at the expense of the assignees; this shows the prudence of putting in these words.

It turns out that Whitely had nothing to do with the purchase; it is not unreasonable to suppose that the assignees might consider, that if he was not acting for himself, he would not have the same motive for making a hard bargain. But no disclosure of the fact of his being himself the purchaser, is made till after the receipt was returned signed by the assignees; nor was any thing intimated as to his knowledge of the death of Mrs Everitt till February 1809, when he writes a letter mentioning, that in consequence of an arrangement with Mr Whitely, the assignment is to be made to him, and that he finds it will be necessary for the assignees to take out administration to Mrs Everitt. This was the first communication made to them of her death, and he does not then communicate what would have been fair, that he was aware of the fact, not only then, but at the time of the contract, at the time of the meeting of the creditors, and from the month of July preceding.

In a subsequent letter he states his reasons for not communicating it: "It is true I did not mention Mrs Everitt's death to you, nor did you inquire after her. It was a circumstance quite immaterial: your inquiry was confined to Mr and Mrs Jenkin, who, if I may be allowed the expression, are the tenants for life, and the reversion I purchased depended upon them, and Mrs Everitt's death neither affected it one way or the other. I told you and Mr Turner, that Mr and Mrs Jenkin were both alive and well, and so they are now." There might be negligence in their not inquiring whether the wife was alive or not; it is extraordinary that such an inquiry was not made, as it certainly should have been. But the defendant, as a man of business, could hardly suppose that the circumstance was not material. What? Was it immaterial that the property could not be made his without providing a settlement for the wife, and that the chance of her surviving her husband was considerable? At all events he probably could not have got the money without allowing her a moiety.

However, I have no objection to impute to the defendant that he really supposed her death made no difference; though it is scarcely possible. It would be great ignorance. But taking it so, it would be an innocent misapprehension, upon which this bargain has gone on to a certain extent, but never to a completion.

The court, in many cases, has been in the habit of saying, that where

parties deal for an estate, they may put each other at arm's length: the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property. As in the case that has been mentioned; if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate.

There have been cases upon contracts by trustees to sell, which is the situation of assignees, where the court has said, not that it will order the contracts to be cancelled, but that if the trustee has been negligent, not taking that care to preserve the interest of his *cestuique trusts* which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence: if he was dealing with one whom he knew to have a duty, and if that duty was plainly neglected, the contract will not be enforced.

But this case goes farther; for it is a case where the defendant knew the fact of the wife's death, and where he must have known before he could get the contract completed, that they did not know it. It is a case where the creditors approved and consented to the contract, as it was laid before them; and consequently, where the damages, if he were permitted to proceed at law, must be paid by them, and not by the assignees. Has he then made out any title either to have the property under his agreement, or to have damages out of the estate, for the non-performance of it. Now, his agreement was to buy what was proposed to the creditors to be sold to him, which was the interest of the bankrupt in right of his wife. That could not mean a wife who was then dead; known by him to be dead; supposed by them to be living. I think, therefore, that a relief ought to be given beyond the decree of the Vice-Chancellor, and that the contract must be delivered up.

It seems to me, that the defendant must have been conusant that the assignees were dealing without sufficient knowledge, and that they were carrying to the creditors a contract, the effect of which they did not understand, and that the creditors, who were to ratify it, did not understand it. This he knew, and I think that he is therefore not entitled to the benefit of the contract.

I should have given costs, if it had been heard before me originally, but not against the decree.

The decree was reversed, and a decree made for the delivery up of the contract, and the purchase-money to be returned with 5*l.* per cent interest.

Mellick *v.* The President and Guardians of the Asylum. The President and Guardians of the Asylum *v.* Mellick.

Jacob, 180.

Bequest out of real estate to erect a monument in a church to the testator's memory, is not

[Mellick *v.* The President and Guardians of the Asylum.]

within the statute of mortmain. Bequest to erect a monument to the testator's memory within a year after his death in the church of A., with a legacy to the rector of A., on condition of his consenting to the erection of the monument, and a direction, that if he refused, the testator was to be buried elsewhere. Held, that the purpose failed by the rector's refusing, for many years, to allow the monument to be erected, though a succeeding rector was willing to consent.

Rolls.—July, 23, 24, Aug. 2, 1821.

R. RUSSELL by his will, dated in April 1784, after desiring that he might be buried at the east end of the vault of the parish church of St John's Southwark, and giving various minute directions as to his funeral, and bequeathing several pecuniary legacies, devised his freehold estates to trustees upon trust to sell; the produce to be applied as follows; viz. 2000*l.* in erecting a monument to perpetuate his memory, in the parish church of St John, Southwark; 100*l.* to Dr Samuel Johnson, on condition of his writing an epitaph to be inscribed on his said monument; and the sum of twenty guineas to the rector of the parish of St John, on condition of his consenting to the placing up of the monument; he directed the monument to be immediately set about after his decease, and to be completely finished as soon as possible, not to exceed one year after his decease. The residue of the money arising from the sale, was to be applied in payment of some of his legacies.

The testator then gave legacies payable out of his personal estate to several charitable institutions, amongst which, was one of 100*l.* to the charity school of the parish of St John, and if his executors should be refused by the rector of the parish of St John, the liberty of erecting the monument in the said church, then he revoked the twenty guineas given to the rector, the sum of 100*l.* given to be spent in provisions at his funeral, and the 100*l.* left to the school of that parish, and in that case he desired to be interred in the parish of St George the Martyr, and gave the twenty guineas to the rector, and the latter sum of 100*l.* to the school of that parish, and the other sum of 100*l.* to be laid out in provisions in that parish. The residue of his personal estate he gave to the asylum; providing that it should be liable to keep his monument in repair, the expense of which was to be paid by the treasurer of the asylum for the time being; he was also to pay four guineas a year to the sexton of the parish where the monument should be erected, to keep it clean and decent.

The testator died in 1784, and in the following year, a bill was filed by the trustees and executors for the purpose of carrying into execution the trusts of the will; and by the decree made in December 1788, the will was declared to be well proved, and the trusts of it were decreed to be performed and carried into execution, and it was referred to the Master to take the usual accounts of the testator's estate.

By the Master's report, dated in June 1799, it appeared that all the sums charged on the testator's real estate, except the 2000*l.* given to erect the monument, and the twenty guineas to the rector of St John had been paid out of the rents and profits, and that there remained in the hands of the surviving trustee, a balance arising from the rents, which with the sum of 466*l.* 3*s.* 7*d.* would be sufficient to meet those two sums. An order was afterwards made on the 15th of June 1799, on the petition of John Mellick, and Sarah his wife (who was the testator's heiress at law), that they should pay the sum of 466*l.* 3*s.* 7*d.*, to the trustee, and that he should thereupon convey the testator's freehold estates to Sarah Mellick, and her

[Mellick *v.* The President and Guardians of the Asylum.]

heirs, or as she should appoint. The estates were soon after conveyed pursuant to this order. Sarah Mellick died in 1803, leaving the plaintiff John Mellick, her eldest son and heir at law, who procured letters of administration to her.

The rector of the parish of St John having refused to permit the monument to be erected, the 2000*l.* and 21*l.* dedicated to that purpose had not been applied, and it appeared that they had been paid by the trustee to the asylum. Some sums partly arising from the rents and profits of the testator's real estate, and partly from his personal estate had been paid into court. The original cause having become abated, a bill of revivor and supplement was filed by the president and guardians of the asylum, claiming the fund in court, and a cross-bill by J. Mellick, claiming, as heir at law, and as administrator to his mother, the 2021*l.* given for the purpose of erecting the monument, with interest, and such part of the fund in court as arose from the real estate. On the causes now coming on, it was agreed that it should be referred to the Master to distinguish what part of the fund in court arose from the real, and what part from the personal estate; and the question was confined to the 2021*l.*, which had been received by the president and guardians of the asylum, and which they stated that they were willing to apply according to the directions of the will. It was understood that the present rector of the parish of St John was willing to permit the monument to be erected.

Mr Agar, Mr G. Wilson, and Mr Girdlestone, for Mellick, the heir at law, contended, in the first place, that the trust for the erection of a monument was void under the statute of mortmain; upon this point they cited Durour *v.* Motteux, 1 Ves. Sen. 321, where annuities to the minister, clerk, and sexton of a parish to preach a sermon to the testator's memory, and to keep his tombstone in repair, were held to be charitable uses, and Howse *v.* Chapman, 4 Ves. 542, where the same was held of a gift for the improvement of the city of Bath. They also argued that the trust had failed by the refusal of the rector of St John to permit the monument to be erected; that the testator's intention was to have it completed within a year or not at all, and that as the court could not now execute that purpose, the benefit must result to the heir at law.

Mr Horne and Mr Parker, for the asylum, argued, that the question had been decided by the decree establishing the will, and by the order of the 15th of June 1799. They distinguished Durour *v.* Motteux, as being a case in which annuities were given to certain officers, and the services required of them were considered only as accessories.

The Master of the Rolls (after stating the facts of the case).

The first objection that is made to this gift is upon the statute of mortmain; that it is a devise to a charitable use, and therefore void. If this were the only question, I strongly incline to think that it would not constitute any valid objection; for I think that this is not a charitable use within the meaning of the statute. The statute does not condemn the application of property to charitable purposes, but, in order to protect persons *in extremis* from imposition, permits it only by deed enrolled in the lifetime of the donor; in this it is contrary to the former law, which while it rendered gifts to superstitious uses void, excepted gifts to charitable uses, and held them good. Now what are charitable uses, have been enumerated in the statute of Elizabeth, 43 Eliz. c. 4, and in Duke, p. 131.

They are when the donor appropriates a gift, either to charity or to some public purpose, such as the repair of bridges, ports, and havens, &c., not operating in any manner to the benefit of himself. But the statute of mortmain does not bear a resemblance to any thing like a sumptuary law; and does not apply to property expended like this by the party on himself, for the gratification of his own vanity, on an object, which, instead of having any similitude to charity, is the very reverse of it; the builder of the monument is to be paid for his labour only. It stands on the same footing as an expensive funeral; and it has never been argued that the expenses of a funeral cannot be defrayed out of real estate. There is nothing to control the general right incident to property of disposing of it, either in the party's lifetime, or after his death, as he may think proper; and though the sum which this testator has devoted to the erection of his monument may be disproportioned to his station in life, the court cannot on any such grounds extend the construction of the statute.

But, on the other ground, I feel that there must be considerable difficulty in determining that the monument ought now to be built. If the delay that has taken place were accounted for by the *lis pendens*, it might be different; but the question that now arises upon the construction of the will is, whether the testator intended the monument to be erected at so remote a period as the present. The sum was directed to be laid out immediately; the idea of having the monument erected soon being probably more gratifying to him, that it might appear shortly after his death, and be seen by those who had known him. If, however, a long interval of thirty-seven years were to elapse, it is a different question, whether it was his intention that it should then be built to revive the recollection of him, at a time when he would be forgotten.

But we are not to speculate upon what might have been his meaning; for he has limited the first year from his death for the completion of the work, if it could be done at all. Application was to be made to the rector for his consent, so speedily that the place of his burial was to depend upon it. If the rector of St John would not consent, he was to be buried elsewhere, so that the point whether the monument was to be erected, was to be determined immediately after his death. In the event of the rector's refusal, he does not say expressly what is to be done, but I think he does by implication; for he desires it to be erected in a particular place, the possibility of doing which depends on another person, and being aware of that, he gives him a legacy to purchase his consent; and must it not then be supposed that if that consent was not given, the monument was not intended to be erected at all? If the will was acted on, he must have been buried in the parish of St George the Martyr, and he could hardly have meant that his body should be in one place and the tomb in another. He says positively that it is to be done within one year, and if within that year the rector will not consent, is not that a negative to the erecting it at all? We now learn that the present rector is differently disposed, but could the testator have meant to suspend the 2000*l.* till a rector could be found willing to have his monument placed in the church? At all events, it could only be suspended for a reasonable time, and when for so long a time that which he directed has been impossible, not from any neglect of his trustees, but from the dissent of another, I think it is too late to say that it shall be done now.

I think the question has not been decided by the decree, or the former order. At the time of the decree the dissent of the rector did not appear;

[Mellick *v.* The President and Guardians of the Asylum.]

his continued persevering dissent for so many years could not be known, and this view of the subject was not therefore before the court. As to the order of 1799, the court was not then determining the question; indeed, it could not properly come under consideration upon petition; the husband of the heir at law being desirous to be put into possession of the estates, paid the amount of the charges, as a fund to be responsible, if it was ultimately decided that it was to be raised. I think it would be too much to press that as a direct consent, and therefore, I consider the question now open. I think the 2000*l.* is not now to be applied to the purpose directed by the testator, and it therefore belongs to the heir at law. With respect to the fund in court, there must be an account taken to ascertain what part of it arises from real, and what part from personal estate.

His Honour doth declare, that inasmuch as a period of thirty-six years and upwards has elapsed since the death of R. Russell, the testator, without erecting the monument by his will directed to be erected in the parish church of St John's Southwark, to perpetuate his memory, such monument ought not at this distance of time from his death to be so erected, but that the said J. Mellick, the heir at law of the said testator, is entitled to the sums of 2000*l.* and 21*l.*, in the pleadings mentioned to have been raised out of the testator's freehold estates, as directed by his will, for the purpose of erecting such monument, with interest thereon respectively, at the rate of 5*l.* per cent per annum, from the 19th day of December 1799, when the accounts relating to the said freehold estates were closed with the then heir at law of the said testator, and such two sums retained for the purpose aforesaid.

Reg. Lib. A. 1820, fo. 2077.

Hall *v.* Dewes.

Jacob, 189.

Quære.—Power of sale to be exercised with consent of three trustees, their heirs or assigns, and the trustees or the survivor, his executors or administrators, to give receipts. A new trustee is appointed in the place of one who retires; another trustee dies. Whether the power can be exercised with the consent of the continuing and the new trustee.

August 2, 1821.

THIS was a suit for a specific performance. The defendant, the purchaser, by his answer insisted upon an objection to the title raised under the following circumstances:

By articles dated in February 1808, made previously to the marriage of J. Venour and Maria Briggs, reciting that the former was seised of an estate, subject to a mortgage for 1600*l.* and interest, and also subject to a rent charge of 120*l.* during the life of his mother Catharine Venour, and to the payment of a sum of 1000*l.* to be raised upon her death, he covenanted with John Briggs, Thomas Briggs, and Henry Eyres Lander, their executors, administrators, and assigns to pay off the mortgage within two years after the marriage, and to settle the estate to the use of himself for life, with remainder to the use of the said J. Briggs, T. Briggs, and H. E.

Lander, their heirs and assigns, upon trust, (until a sale should take place) to permit the said Maria Briggs to receive a rent charge by way of jointure, and upon trust to sell the estate as J. Venour should by deed or will direct, and in default of such direction, then with all convenient speed after his death, and to hold the money to arise from the sale upon certain trusts. It was provided that in the settlement a power should be contained to enable the said J. Venour, by and with the consent and approbation of the said J. Briggs, T. Briggs, and H. E. Lander, their heirs or assigns, but not otherwise, to make sale of all or any part of the said messuages, &c., for the best price or prices that could or might be obtained, or for such equivalent in lands and hereditaments as should by the said J. Briggs, T. Briggs, and H. E. Lander, or the survivor, be thought reasonable; and upon payment of the money arising from such sale or sales it was to be lawful for the said J. Briggs, T. Briggs, and H. E. Lander, or the survivor, his executors or administrators to give and sign receipts, which should be sufficient discharges to the purchasers. The settlement was to contain the usual and full powers for appointment of new trustees, to be nominated by J. Venour and Maria Briggs during their lives, and by the former if he should survive, but after his decease the nomination and appointment to be by the surviving or other trustees then in being, and which nomination and appointment were to take place as often as any one or more of the trustees should die, be desirous of being discharged from, or refuse, or decline, or become incapable of acting in the trusts. It was also provided that any variation might be made in the form and order of the articles and the uses and trusts thereof, which would better effectuate the intention of the parties thereto as therein expressed.

The marriage soon after took effect, and the mortgage having been paid off, indentures of lease and release of the 9th and 10th of August 1809 were executed by J. Venour and his wife of the one part, and J. Briggs, T. Briggs, and H. E. Lander of the other part, by which, after reciting the articles at length, Venour conveyed the estate to uses corresponding to those expressed in the articles. A power of sale was reserved to Venour by and with the consent and approbation of the said J. Briggs, T. Briggs, and H. E. Lander, or the survivors or survivor of them, or of the heirs or assigns of such survivor, or of the trustees or trustee for the time being, such consent to be testified in writing under their hands and seals; and upon payment of the money arising from such sale or sales to the said J. Briggs, T. Briggs, and H. E. Lander, or the survivors or survivor of them, or to the trustees or trustee for the time being, they or the survivors or survivor of them, or the trustees or trustee for the time being were to sign and give receipts, which were to be sufficient discharges. There was a power to appoint new trustees in the event of any trustee dying, or being desirous of being discharged, or refusing, or declining to act, or becoming incapable by being in parts beyond the seas, or by any other inability.

Thomas Briggs going abroad, Walter Lander was appointed a trustee in his place. John Briggs died, and before his place had been supplied, an agreement was entered into for sale of the estate to the persons under whom the plaintiffs claimed; and it was conveyed accordingly by indentures of lease and release of the 1st and 2d of May 1810. H. E. Lander and Walter Lander, the then trustees, joined in the conveyance. The heir of John Briggs was abroad, and did not join. The objection taken was that the conveyance of May 1810 was not a due execution of the power of sale contained in the articles and settlement.

[Hall *v.* Dewes.]

A motion was made for payment of the purchase money into court, in order to take the opinion of the Lord Chancellor; when his Lordship ordered the cause to be set down before him. It now came on for hearing.

Mr Shadwell, for the plaintiffs.

Mr Sugden and Mr J. Martin, for the defendant.

The clause in the articles directing that the settlement should be framed so as best to effectuate the intention, did not warrant the variation made in the power of sale; such clauses do not authorize an alteration of the uses. Stanley *v.* Stanley, 16 Ves. 491. The question therefore depends upon the power of sale given by the articles; and this was not well executed by the conveyance of May 1810. The power was either lost by the death of one of the trustees, or could not afterwards be exercised until the former number had been filled up. In Townsend *v.* Wilson, 1 Barn. & Ald. 608, a power of sale was given to three trustees and their heirs; one died, and it was held that the survivors could not exercise it.

The Lord Chancellor observed, that if the intention was that the three persons named in the articles should consent, the clause as to varying the settlement to effectuate the intention would not help the case. With respect to Townsend *v.* Wilson, his lordship asked whether the court of king's bench considered that the two surviving trustees and the heir of the deceased trustee were to act together; for it was one thing to say that the survivors should not act until another was appointed, and a different thing to say that the heir of the deceased trustee could act in the mean time. His lordship said that he did not agree with the decision in that case; he believed that he should not have been induced so to decide it, but he could not make the defendant take the title upon any opinion of his. It must be understood that he proceeded on the ground that he could not compel the purchaser to accept the title, for he should be sorry to have it recorded that he agreed to that case.

Logan *v.* Fairlee.

Jacob, 193.

Persons residing out of the jurisdiction not to be appointed guardians by the court.
August 3, 1821.

THIS was a petition praying that a person named in it might be appointed to act as guardian to the infant plaintiffs, who were resident in Scotland, and that the infants' property, about 20*l.* per annum each, might be applied for their maintenance. The person proposed resided in Edinburgh.

Mr Heald, in support of the petition.

The Lord Chancellor. Some one resident within the jurisdiction

must be appointed. There must be some one answerable to the court(*a*).

A person residing in London was then proposed; he was appointed to have the care of the maintenance and education of the infants, and it was ordered that the dividends should be paid to him, to be applied for their maintenance.

Reg. Lib. B. 1820, fo. 1602.

Beer *v.* Ward. Ward *v.* Beer.

Jacob, 194.

Plaintiff, in a bill to restrain the setting up of outstanding terms, cannot bring an ejectment before the hearing without the leave of the court.

Injunction to restrain the setting up of terms not obtained on motion.

August 6, 1821.

THESE suits related chiefly to certain real estates lately belonging to William Cotton, a lunatic, deceased, to whom R. Ward, the defendant in the first cause, had been committee. The title depended upon the question whether W. Cotton was or was not legitimate, and the original bill, stating impediments in the way of trying it at law, prayed an issue for that purpose. The cross bill also prayed an issue, and liberty to examine witnesses *de bene esse*. Some time after the filing of the bills, the parties agreed to try the question between them in an issue, and an order was made by consent on the 27th February 1821, directing an issue, to be tried in the common pleas. The issue stood for trial on the 15th June, previous to which there had been some negotiations for a compromise, and it appeared that the parties, expecting an arrangement, had not made the requisite preparations for proceeding with the trial. The treaty, however, was broken off on the morning of the 15th, and the consequence was that by consent the trial of the issue was adjourned till Michaelmas term.

The plaintiffs in the original cause, about the 20th of June, commenced an ejectment for a part of the estates situated in Shropshire, and were proceeding to trial at the approaching assizes. The defendant R. Ward upon this filed a supplemental bill to restrain this action, upon the ground of the agreement and order for an issue, and also suggesting prejudices on the subject prevailing in the county of Shropshire. A motion was now made for an injunction.

Mr Wetherall, Mr Shadwell and Mr Pepys, in support of the motion, contended that the parties having agreed to try the question in an issue, and that agreement having been embodied in an order of the court, they could not be permitted to proceed in a different manner.

Mr Hart and Sir G. Hampson, on the other side, stated circumstances upon which they contended that the postponement of the trial was attributable to Ward, and therefore that the other parties ought not to be pre-

(*a*) Ex parte Ord, ante, p. 44.

judiced by the delay. It was of importance to have the trial soon, some of the witnesses being old.

The Lord Chancellor. Mr Ward was in possession of the estates as committee, and after the lunacy was over, he wished to retain the possession for his own benefit. That of course could not be permitted. Then, if I understand the matter, a bill has been filed, treating all the estates, including that for which the ejectment is brought, as estates that are covered by terms or mortgages, that may be set up to defeat an ejectment, and praying to have them removed out of the way; then, if it remains a bill treating all the estates as liable to have an action met by that sort of defence, the first question will be, whether you must not move for leave to bring an ejectment: for although it is very common for gentlemen at nisi prius to suppose, that as soon as such a bill is filed, they may immediately bring an ejectment, and come to this court by motion to prevent the terms from being set up, yet that is not the proper course of proceeding(*a*). No ejectment under such circumstances can be brought before the hearing of the cause, unless by leave of the court, or by amending the bill by leaving out the estates in question in the ejectment. That I take to be quite clear.

In this case, the proceedings at law were not instituted by the mere pleasure of the parties: and I apprehend it was not the agreement of the parties, but the consent of the court that authorized that proceeding before the hearing. There may be many cases where the court may see that there is nothing to be tried in the ejectment, and it will not send it to law, but will decide itself on the equitable title.

But, no doubt, in cases like this, there may be witnesses whose evidence may be so important, that procrastination may be a direct defeat of all justice. And, therefore, in such cases, though the practice be that ejectments shall not be brought without leave, it may be proper to examine witnesses *de bene esse* in the cause; and if at the hearing of the cause in equity the court should direct an ejectment, and any of those witnesses should be dead, of course the parties would have the benefit of their testimony. Still the court does not permit the ejectment to be brought if the pleadings touch the estate with reference to which it is brought, and it would be necessary before bringing it, to amend the bill by striking that particular estate out.

Now, if in this case it be the fault of Ward that the trial did not proceed, and if there be danger in procrastinating it with respect to loss of witnesses, then certainly, on a motion for leave to go on with the ejectment, (and I cannot but think that that is a motion which you ought to make) the court would not allow the trial to be put off till November without taking care that the same evidence shall be producible then, which would be producible now, and therefore the witnesses might be examined in the mean time. I throw out this that you may consider it when any further affidavits have been filed.

The ejectment was given up, and the issue was afterwards tried.

(*a*) Hylton *v.* Morgan, 6 Ves. 293. Barney *v.* Luckett, 1 Sim. & Stu. 419. Northey *v.* Pearce, Ibid. 420.

Mucklow *v.* Fuller.

Jacob, 198.

Where personal property is bequeathed to the executors, as trustees, the probate of the will is an acceptance of the trusts.

The usual indemnity clause does not exonerate one of two trustees from a loss, occasioned by a debt due from the other, having been suffered to remain outstanding.

August 4, 6, 7, 1821.

MARY HIGGINSON, by her will dated in April 1797, reciting that John Mucklow was indebted to her in a sum of 500*l.* on his bond, directed her executors and trustees to get in and place the said 500*l.* on government stock or security at interest in their joint names, within three years next after her decease; and she gave the annual produce thereof to her brother for his life; and after his death she gave 250*l.* part of it to A. Wratislaw, and she gave to the plaintiff Frances Mucklow the sum of 250*l.*, the other half part, the interest to be applied by her executors towards her education and maintenance until she should attain the age of twenty-one years or be married, and the capital then to be paid. She appointed John Mucklow and J. Fuller to be her executors. The will contained a clause declaring that Mucklow and Fuller were to be chargeable with or accountable for such moneys only as they should actually receive, and not to be answerable or accountable for each other, but each for his own acts, receipts, payments, neglects, or defaults only, and not for any moneys for which they should join in any transfer or sign any receipt for conformity; and they were not to be answerable for any banker with whom they might deposit the trust moneys, or for any other loss, unless it should happen through their wilful default.

The testatrix survived her brother, and died in 1799, and the two executors proved the will. The sum of 500*l.* due from Mucklow was not paid in or invested according to the directions of the will. The plaintiff, who was the daughter of Mucklow, came of age in the year 1813, and in the year 1817, filed her bill to compel payment of her legacy of 250*l.*

The defendant Mucklow, who, in the year 1815, had taken the benefit of the act for the relief of insolvent debtors, in his answer contended that he had in fact satisfied his daughter's legacy by extra expenses incurred in her education and advancement. The defendant Fuller stated that though he had proved the will, he had never possessed himself of any of the effects of the testatrix, and did not accept or act in the trust of the will, except by joining in transferring some stock, and in executing a power of attorney for the receipt of the dividends, and he therefore conceived that he was not answerable for the loss arising from the insolvency of Mucklow. He admitted that he had, in 1811, taken a mortgage from Mucklow for a debt due to himself, but denied having any suspicion that he was likely to become insolvent.

The cause was heard in June 1819, before the Vice-Chancellor, who directed an inquiry whether the plaintiff was ever in any manner and how satisfied or paid her legacy, or any part of it, or whether it had been and how applied to her use, and at what time or times; and if the Master should find that she was not satisfied her legacy, then he was to inquire

when she first knew that it was bequeathed to her, and how soon after she came of age, and was informed of it, she applied to the defendant Fuller for payment of it, and whether she in any manner acquiesced in its remaining in the hands of Mucklow. The Master by his report certified that no part of the legacy had been satisfied; that the plaintiff had been apprized of the legacy in August 1812, but did not apply to Fuller for payment till August 1816; and that she had not acquiesced in its remaining in the hands of Mucklow, except by not demanding it. It appeared that she was subject to fits, and a person of weak intellects.

The cause was heard before the Vice-Chancellor upon further directions on the 3d of April 1821, when a decree was made for payment by the defendant Fuller of the legacy, with interest from the time of the plaintiff's coming of age, and costs. From this decree the defendant Fuller appealed, and now moved to stay proceedings in the meantime.

Mr Horne, in support of the motion.

The question is, whether the defendant Fuller is responsible for the debt due from his co-executor. In the character of executor only he could not have to answer for the misconduct of his colleague. He has done nothing to accept the office of trustee. The probate of the will, the only circumstance that can be pressed against him, is referable to the character of executor; the two offices are distinct; that of trustee could not commence till that of executor had determined by the assets being got in and administered. Never having assumed the office of trustee, he cannot be called to account as for a breach of trust. In addition to this, there has been great laches on the part of the plaintiff in permitting the sum to remain for several years in the hands of her father, and making no demand until his insolvency.

Mr Hart and Mr Garratt, on the other side.

The probate was an acceptance of the office of trustee. It cannot be defined at what period the office of executor ceases, and that of trustee begins; for the two offices are united: the 500*l.* is given to them upon express trusts. If the defendant is fixed with the character of trustee, it is clear that his neglecting to take any step for calling in this debt according to the direction of the will, was a breach of the duty belonging to his office. His taking a security for his own debt marks his sense of the necessity that existed for some precaution. The laches is excused by the condition of the plaintiff, and her ignorance of the nature of the legacy, of which it was the duty of Fuller to have apprized her.

The Lord Chancellor. It is clear that the defendant having proved the will, by so doing accepted the legacies in trust: he cannot say that he has not accepted the trust. The will contains express directions what the executors are to do, and if he makes himself an executor, he must do all which he is directed to do as executor.

I think the circumstance of his taking a security for his own debt is of no importance. I look on him as acting *bonâ fide*, and supposing that he had nothing to do with the trusts; I take that to have been his opinion. The circumstance of her not demanding it is of little consequence, and for this reason: if he was not liable, it was of course nothing; if he was, he stood in a situation in which he ought to have had communication with her upon the subject. He cannot impute to her as laches, the circumstance of her not demanding it, when he was all along contending that he was not

bound to pay it. The question is, whether looking at all the contents of the will, and at his having proved it, he has not involved himself in a liability that he had no conception of. I cannot but think it is most dangerous to lay it down, that with such a clause as this, he can prove the will, and then say that some one else may perform the trusts.

Aug. 7.—The Lord Chancellor, after stating the will, observed, that the indemnity clause would not apply to the case.

The defendant admits that he has proved and has made himself executor, and then the question is, whether having done that, it is possible for him, (attending to what was the intention of the testatrix) to say that though executor he is not clothed with any of the trusts. Now my opinion is, that if he took on himself to be executor, he was to do all that she intended her executors to do, and it was her intention that the persons taking out probate should take upon themselves all the trusts. On this principle I think the decree right, and that Fuller must be answerable if the money could have been recovered from Mucklow. On that point, if necessary, there may be an inquiry.

The inquiry was declined, and the appeal dismissed.
Reg. Lib. B. 1820, fol. 1496.

Warington *v.* Wheatstone.

Jacob, 202.

It is no objection to an interpleading bill that a suit between the same parties commenced by one of the claimants of the fund is pending.

The injunction on an interpleading bill stays all proceedings.

In an interpleading suit, the injunction may be moved for before the time for answering has expired.

July 11, Aug. 7, 1821.

IN the year 1807 Anthony Henderson effected an insurance at the office of the Albion Fire and Life Insurance Company for the sum of 3000*l.* upon the life of Samuel Henderson. S. Henderson died in February 1821, upon which the 3000*l.* was claimed by sir F. G. Fowke and Mary Ann his wife, the latter being the personal representative of Anthony Henderson, who had previously died. Another claim to the 3000*l.* was also made by John Wheatstone, the personal representative of Samuel Henderson. He alleged that the insurance had been effected as a collateral security to Anthony Henderson, with a mortgage made to him by Samuel, and that the mortgage had been paid off by Samuel in his lifetime, by which means he had become entitled to the benefit of the policy. Samuel Henderson had in 1818 filed a bill against sir F. G. Fowke and his wife, representing that he had discharged the mortgage, and praying an account and a reconveyance, and an assignment of the policy; the answers were put in, but no further proceedings had been had in the cause.

Wheatstone, on the 28th of February 1821, served the Albion company with a notice of his claim, demanding payment of the 3000*l.* On the 7th

[Warington *v.* Wheatstone.]

of May he filed a bill against sir F. G. Fowke and his wife, and D. R. Warington, and W. Rayley, the plaintiffs in this cause, who were the surviving directors of the Albion company, who had signed the policy in question, praying that he might be declared entitled to receive the 3000*l.*; and an injunction to restrain Warington and Rayley from paying it to Sir F. G. Fowke and his wife, and to restrain the latter from commencing any proceedings at law for the recovery of it.

Sir F. G. Fowke and his wife as of Easter term, commenced an action for the 3000*l.* due upon the policy, against Warington and Rayley, upon which they on the 5th of June filed a bill of interpleader against Wheatstone and sir F. G. Fowke and his wife, and after the time for answering had elapsed, they moved before the Vice-Chancellor for liberty to pay the 3000*l.* into court, and for an injunction against the defendants. The motion having been refused by his honour, was now renewed before the Lord Chancellor.

Mr Hart and Mr E. R. Daniell, in support of the motion, contended that a party in possession of property subject to conflicting claims, might always protect himself by a bill of interpleader, notwithstanding the pendency of a suit commenced by one of the claimants. The Vice-Chancellor in this case, and in Lowe *v.* ——, 3 Mad. 277, thought the first suit a sufficient indemnity, and that we might have moved in that suit for an injunction upon paying the fund into court; but in Birch *v.* Corbin, 1 Cox, 144, a motion for that purpose was refused. In Paris *v.* Gilham, Coop. Ch. Ca. 56, and Morgan *v.* Marsack, 2 Mer. 107, the same point arose; a bill having been filed in each case by one of the claimants; but they were nevertheless held to be cases of interpleader. They also cited Langston *v.* Boylstone, 2 Ves. Jun. 101, Dungey *v.* Angove, 2 Ves. Jun. 312, 3 Bro. C. C. 36, and Angell *v.* Hadden, 15 Ves. 244, 16 Ves. 202, and alluded to the rule laid down by his honour the Vice-Chancellor that the injunction in an interpleading bill was only to be granted in the same manner as the common injunction to stay proceedings at law(*a*).

Mr Heald, Mr Ching and Mr Purvis, on the other side.

The objection to the present suit is that it is quite unnecessary, as every object that can be desired from it may be obtained in the other suit of Wheatstone *v.* Warington, in which the parties are the same as in this. The Vice-Chancellor considered that Warington and Rayley might have moved in that suit for the injunction, that is now their object. But whether they could or could not, that suit furnished a complete indemnity to them; for the plaintiff in that suit may move for them to pay the money into court, and to restrain Fowke and his wife from proceeding in their action; if he neglects to do so, and they, in consequence, pay the money to Fowke, the plaintiff could not complain of the consequence of his own laches.

The Lord Chancellor. The injunction on an interpleading bill does not, like the common injunction, leave the plaintiff at law at liberty to demand a plea, and proceed to judgment, but it stays all proceedings. The plaintiff in an interpleading bill admits that he has no defence, and makes an affidavit that he does not collude with either party; the protection that he has is, that he is relieved from their proceedings against him, whether at law or in equity, as soon as his diligence enables the court to

(*a*) See Croggon *v.* Symons, 3 Mad. 130.

do so. The question here seems to be, whether that protection is to be taken away, because the plaintiff in some other suit may make a motion for payment of the money into court. If a party gives notice of his claim to the money by filing a bill, and it is afterwards paid away pending the suit, I do not know that his not having moved for it to be paid in would be any protection.

It is important certainly to consider these points, for I understand that an opinion is afloat that on an interpleading bill the injunction cannot be moved for till the time for answering is out. I always thought that it was not so, but that the injunction might be moved for at once; indeed there are some cases where the injunction would be quite useless, unless it could be obtained immediately. Some mistake I believe arose in a communication that I had on this point with the Vice-Chancellor through Mr Crofts. I think I then mentioned to him the case of the plaintiff, not knowing that a bill would be necessary, from not having notice of the demand of one party, till the other had obtained judgment, and was about to take out execution.

Here the question is, whether the plaintiffs can have the same protection in another person's suit that they can have in their own. If you do not let them have the carriage of the cause, and the plaintiff in the other does not move for them to pay the money in, I question whether his not doing so would be an answer to him at the hearing, for the pendency of the suit is notice of his demand. If the plaintiffs in this cause could make this motion in the other cause, it must be supported by an affidavit of there being no collusion, otherwise they could not be allowed the same advantages that they would have upon a bill of interpleader; but I do not remember any instance of such a motion.

Aug. 7.—The Lord Chancellor made the order for the injunction on payment of the money into court.

Reg. Lib. B. 1820, fo. 1619.

Shelley *v.* Bryer.

Jacob, 207.

Testator gives the residue to be divided after his sister's death, amongst his nephews and nieces, and by a codicil gives to a great niece, whom he calls his niece, 500*l.* over and above her share after the decease of his sister, in the body of his will treated of more at large: held, that none of the great nephews or nieces were entitled to share in the residue.

Rolls.—Aug. 7, 8, 1821.

SAMUEL SHELLEY by his will dated in 1805, after bequeathing some legacies and annuities, gave the residue of his real and personal estate to trustees, upon trust to sell such part of it as did not consist of money in the funds, to invest it on government or other securities, and to pay the interest to his sister Susannah Shelley for her life, and immediately after her death, he directed all his residuary property, subject to the annuities before bequeathed, to be divided unto and equally between his nephews and nieces who might be then living.

[Shelley *v.* Bryer.]

The testator afterwards made several codicils, by the third of which, dated in July 1807, he gave to his infant niece Harriet Shelley, whom he had not then seen, the sum of 500*l.* at one year after his decease, over and above her share after the decease of his sister in the body of his will treated of more at large. The testator died in January 1809.

Harriet Shelley, mentioned in the third codicil (the plaintiff in this cause), was born subsequently to the date of the will, and was a great niece of the testator's. The testator at the time of his death had several nephews, and two great nephews, but no niece, and no great nieces, except the plaintiff. His sister Susannah Shelley died in 1819, and previously to her death several great nephews and great nieces to the testator were born. Under the decree in the cause the Master had taken the accounts of the testator's estate, and had made the necessary inquiries as to the state of his family. The cause now came on for further directions.

Mr Horne and Mr Stephen, for the plaintiff, contended that the fund was divisible between the testator's nephews and the plaintiff, she being specifically named in the codicil as one of the persons to take.

Mr Whitmarsh and Mr Garratt, for the great nephews and great nieces, contended that they were entitled to share equally with the nephews. The words nephew and niece may fairly be taken to include great nephews and great nieces, and the testator has shown that he meant to use them in that extended sense, by applying the term niece to the plaintiff, who, as he must have been aware, was his great niece. In Wyth *v.* Blackman, 1 Ves. Sen. 196, Amb. 555, the word children in a deed, being used with the word issue, was taken to comprehend grandchildren and great grandchildren. So in Hussey *v.* Dillon, Amb. 603, great grandchildren took under the description of grandchildren, upon a ground applicable to this case; viz. that one great grand-daughter was styled by the testatrix her grand-daughter. In Mayott *v.* Mayott, 2 Bro. C. C. 125, great nieces were included under the description of first and second cousins.

Mr Tyrrell, for the testator's nephews.

It must be admitted that if the will stood alone, there could be no ground for the claim of the plaintiff and the other great nieces and great nephews. The terms nephews and nieces are not ambiguous, and unless extended by some peculiarities cannot include great nephews or nieces. Falkner *v.* Butler, Amb. 514. The same reasoning applies in those cases where the word children has been held to comprehend grandchildren, a construction which, as stated by Sir W. Grant in Radcliffe *v.* Buckley, 10 Ves. 195, is only resorted to where the testator by other expressions shows that he uses the word in its more extensive signification, or where the will would otherwise be inoperative, from there being no children in the strict sense to take. But "where the devise is to children, the grandchildren cannot come in to take with the children." Crooke *v.* Brookeing, 2 Vern. 106. In Gale *v.* Bennett, Amb. 681, the grandchildren were held to be included, because there were no children, and this distinction is recognised in Wyth *v.* Blackman, and Royle *v.* Hamilton, 4 Ves. 437, both of which cases turned upon the circumstance of other parts of the instrument explaining the word in question. In Radcliffe *v.* Buckley, the extended construction which was contended for, was rejected on the ground that it would have let in the grandchildren to take together with their parents. The same difficulty would arise here. There is nothing in favour of the plaintiff, but the inference that may be raised from the codicil; but the courts have

been in the habit of refusing to raise implications under much stronger circumstances. Denn *v.* Bagshaw, 6 T. R. 512, Parsons *v.* Parsons, 5 Ves. 801 : it is only a mistaken recital of a legacy which he had not given. Frederick *v.* Hall, 1 Ves. Jun. 396; Upton *v.* Lord Ferrars, 5 Ves. 801.

The Master of the Rolls. I must confess that I have not been able to come to a very clear conclusion, but I will state how it strikes me at present, reserving an opportunity for further consideration. On the construction of the will taken alone, it is admitted on all sides that there is no ambiguity, and it is not a case where difficulty arises from there being no person to answer the description; the gift is prospective, and other nephews and nieces might have been born before the death of the tenant for life.

It appears by the cases that where there are, or may be at the time when the distribution is to take place, persons answering the description, the court is not at liberty to include any not within the terms. Thus it being clear upon the will, the onus is thrown on those who desire to extend the construction. The codicil gives rise to the doubt; and with respect to this it is to be observed, that though the codicil must be taken with the will, yet it is not actually the same as if it had formed part of it; for at the time of making it, the testator might have been writing only from recollection of what he had done by his will, and without an accurate knowledge of its contents. In the interval between the will and codicil the plaintiff was born. The testator gives to her 500*l.* at one year after his decease; as to that, if it stood alone, there could be no doubt; but he adds these words: "over and above her share after the decease of my sister in the body of my will treated of more at large." I think it is impossible to contend that this does not refer to the passage in his will disposing of the residue. Hence the argument arises that it was the intention of the testator retrospectively to give a construction to the words used in his will. The difficulty is, that if the words are to be extended with respect to the plaintiff, the same must be done as to the other great nephews and great nieces, and both the classes, including the parents and children, must take together under the same denomination. But it would be contrary to the authorities to interpret a term having an appropriate application to one class, as extending to two classes, comprising both parents and children.

The most cogent argument in favour of the plaintiff is, that the testator has called her his niece, and that this, coupled with the will, puts an interpretation upon it, and shows that he meant to use the term in a sense that should include her. But still I feel a difficulty about it, and I think the weight of the argument is the other way, and that we must consider it to be a mis-recollection of his will ; he is speaking of the share which he had given her, when, in fact, he had given her none. I confess that I am not satisfied with this conclusion ; there is considerable difficulty on both sides ; but I think it is better to abide by the terms, which are express, than to take upon myself by inference to enlarge them, either to let in the plaintiff or the other great nephews and nieces.

The Master of the Rolls afterwards stated that he continued of the same opinion.

His Honour doth declare, that according to the true construction of the

will and codicils of S. S., the testator, in the pleadings named, the residue of his personal estate, after payment of his funeral and testamentary expenses, debts, and legacies, became upon the death of his sister S. S. divisible in four equal parts, among the four nephews in the Master's general report named living at the death of his said sister S. S.

Reg. Lib. B. 1820, fo. 1949.

Tyndale *v.* Warre.

Jacob, 212.

A reversion expectant upon an estate for life, and upon estates tail limited to unborn children, held to be assets for the payment of specialty debts, and decreed to be sold for that purpose. A reversion expectant upon an estate tail may be sold for payment of specialty debts. *Semble.*

Rolls.—August 7, 10, 1821.

THIS was a creditor's bill, and the personal estate of the testator being insufficient for the payment of his debts, a question was made at the hearing, whether a reversion in fee, of which the testator was seised under the following circumstances, should be decreed to be sold.

By fine and an indenture, dated in January 1819, certain freehold estates were limited to such uses and for such trusts as J. T. Warre (the testator) and E. M. T. Warre (his daughter) should appoint, and in default of appointment, to the use of J. T. Warre for life, with remainder to the use of E. M. T. Warre for her life, with remainder to trustees to preserve contingent remainders; with remainder for life to any husband that E. M. T. Warre might marry, if she should think fit so to limit the same: with remainder to such of the children of E. M. T. Warre, born in marriage, as she should appoint; and in default of appointment, to the use of all and every such children or child, and of the heirs of their bodies, in such manner, and for such estates, and subject to such provisions as therein mentioned; and for default of all such issue, to the use of J. T. Warre, his heirs and assigns.

J. T. Warre died in May 1819, intestate as to the reversion of the estates comprised in the above settlement, which on his death descended upon his daughter E. M. T. Warre as his heiress at law. She was unmarried.

Mr Coote, for E. M. T. Warre.

The reversion in question is subject to the life estate limited to the daughter of the deceased, and the estates tail limited to her children: the question whether the court will decree it to be sold for the payment of bond debts cannot be affected by the circumstance that the estates tail are not yet in existence; they may hereafter arise, and are prior to this reversion, which is therefore a reversion after an estate tail. A reversion after an estate for years is present assets at law, and immediate execution may be issued; if after an estate for life, it is termed *quasi assets*, and a judgment *quando acciderit* may be obtained by the bond creditor. Hence reversions of this kind may be sold; but reversions after estates

tail have always been distinguished; they are frequently said not to be assets, or only assets *in futuro;* that is, when they fall into possession. The heir may plead *riens per descent*, and there will be no judgment against him during the continuance of the intermediate estates, and hence they have never been considered saleable. The distinctions are explained by lord Holt in Kellow *v.* Rowden, Carth. 126; 3 Mod. 253. In Kinaston *v.* Clark, 2 Atk. 204; 2 Cruis. Dig. 447, the heir devised away the reversion, and on its afterwards falling into possession, the question arose, whether it could be made liable to the bond debts in the hands of the devisee. It was there assumed in the argument on both sides, that the reversion could not have been sold, and lord Hardwicke founds his judgment upon the fact of its having come into possession. He says "that there was a possibility of its being liable; there was a liableness in it, a quality in it to be so, to be subject to the debt(*a*)." He adds, that it is not accurate to say that it is not assets, as the creditor may take it when it comes into possession(*b*). And in Smith *v.* Parker, 2 W. Black, 1230, lord chief justice De Grey expressly states the distinction to be, "that a reversion expectant on an estate tail is not immediate assets, and therefore it cannot be extended: nor can the heir be compelled to sell it, as he may be in case of a reversion on an estate for life." Sir W. Blackstone in the same case says that, though assets, it was "only dormant potential assets till it came into possession." The authority of this case has certainly been impugned by lord Thurlow, in Tweedale *v.* Coventry, 1 Bro. C. C. 240, but upon other grounds. If the reversion be not available as assets at law, it must be the same in equity, where nothing is done beyond the law, except to extend the remedy of the creditors. In Kinaston *v.* Clark, 2 Cruis. 469, lord Hardwicke says: "but yet I know of no case where equity decrees a thing itself to be liable, which the law says is not liable, or is not analogous to what the law directs, except only in the case of an advowson in fee.

Mr Horne and Mr Bligh, for the plaintiffs.

The reversion in this case is dependent on an estate for life, with remainders in tail to persons not yet *in esse*, which may therefore never take effect. In the mean time it must be treated not as a reversion after an estate tail, which at present it is not, but as a reversion after an estate for life, which is clearly saleable.

But even with respect to a reversion after an estate tail, it is, as observed by lord Hardwicke, 2 Atk, 206; 2 Cruis. 466, a gross and inaccurate expression to say that it is not assets, and all the authorities agree that it becomes liable when it falls into possession. The court may, therefore, declare that it must be sold at a future period; an immediate sale will, therefore, do no prejudice to the heir, while it will benefit the creditors. The ground on which courts of equity lend their aid to creditors to order a sale, instead of leaving them to their legal remedy of retaining the

(*a*) 2 Cruis. 466.

(*b*) In a MS. note of Kinaston *v.* Clark, with which the editor has been favoured by Mr Stuart, of Lincoln's Inn, this part of the judgment is expressed in the following terms:

"The saying that a reversion or remainder in fee after an estate tail is not assets, is a gross and inaccurate expression, and means no more than the creditors cannot have any execution of it till the tail is spent. I am of opinion that such remainder hath always in it the quality of assets until it be barred, and that it makes no difference whether it depends upon an estate tail in the debtor himself and his heirs, or a stranger."

amount of their debts out of the rents and profits, is that it may accelerate the payment. Stileman *v.* Ashdown, 2 Atk. 608. The same reason applies to this case ; upon principle, a reversion cannot be distinguished from any other real estate. Even an advowson in gross, though not assets at law, will be sold in equity for payment of debts(*a*). They also cited Coleman *v.* Winch, 1 P. W. 775, and Galton *v.* Hancock, 2 Atk. 424.

August 10.—The Master of the Rolls. This case divides itself into two questions ; first, whether supposing the reversion to be dependent upon an estate tail actually existing, it ought according to the authorities to be sold before it comes into possession ; and, secondly, whether it is competent to the court to order a sale, circumstanced as this case is.

The former of these questions involves, in the first place, this point, whether a reversion in fee after an estate tail is, in the hands of the heir, assets for the payment of the bond debts of the ancestor, from whom it descended. For we have here a direct immediate descent from the person who was the owner, and who had the reversion remaining in him, and the debts sought to be satisfied were created by him. The reversion was a part of his real estate, and according to all general principles, every part of the real estate of the debtor, excepting copyhold, is considered as applicable to the payment of his specialty debts. The heir is himself liable to the debt : he becomes the debtor, and unlike the executor, he is chargeable in the *debet*, the ancestor having bound himself and his heirs ; he can only get rid of the liability by pleading that he has not assets descended sufficient to cover the demand.

Still there are a great number of authorities which make a distinction between a reversion after an estate for life, and a reversion after an estate tail, declaring the former to be assets or quasi assets, and the latter not to be so till it falls into possession. The authorities are very numerous, beginning with lord Coke, who says(*b*), "that the law favours estates in tail in possession, and doth not regard remainders or reversions expectant on the estate tail ;" and he also mentions, that "it was adjudged in 12 El. between Terling and Trafford, in the king's bench, that a remainder or reversion expectant on an estate tail, is no assets to the heir, in debt on a bond made by his father(*c*)." In the same book in fo. 59, he repeats this doctrine. I observe that in some of the arguments it is said that the case of Terling *v.* Trafford is nowhere to be found, and though I have taken some trouble in searching for it, I have not been able to meet with it. It was, however, certainly a case in the king's bench, and, therefore, only determined that the reversion was not assets at law.

It is laid down in Rolles' Abridgement, 269, that a reversion in fee expectant upon an estate tail is not assets, because it is in the power of the tenant in tail to bar it. In Carthew, 129, it is said to have been agreed that it was not assets to charge the heir upon the general issue *riens per descent*, and the same doctrine is repeated in Comyn's Digest, tit. Assets, P. The same principle is acknowledged in the argument in Kinaston *v.* Clark, and I observe that sir Dudley Ryder, who argued that case, began with admitting that the reversion could not be sold till it fell into possession. Mr Serjeant Williams also in a note to Saunders, vol. ii. p. 8, n. 4, where he has treated at large upon the whole of this subject, distinguishing between

(*a*) 3 P. W. 401. (*b*) Mildmay's case, 6 Rep. 42. (*c*) Ibid.

a reversion after an estate for life and after an estate tail, states that the latter is not assets.

This certainly constitutes a strong body of authority, showing a general opinion, from a very early period down to 1741, that a reversion after an estate tail does not become assets till it falls into possession, and I do not find any direct authority to the contrary. But, on the other hand, there is no case deciding that it may not be assets in equity; whether it is or not seems to be a new question, without any authority either way.

To consider this first upon principle, observe the course of proceeding at law. There are three cases of reversions; if it be a reversion dependent upon a term of years, the law does not consider the term as any thing, and judgment is given against the heir, if he plead *riens per descent.* But if the creditor takes out an *elegit,* he is stopped by the term, which is a good defence for the lessee in ejectment, and so there is a *cesset executio* during the term. If it be a reversion after an estate for life, the heir must plead specially, stating that he has no assets, except this, and setting forth what it is; the creditor may then take judgment *quando acciderit.* In the case of a reversion after an estate tail, the authorities say that the heir may plead generally *riens per descent,* distinguishing this from the plea in the case of a reversion after an estate for life. The plaintiff may then reply that there is this reversion descended to the defendant, and he may then have a judgment *quando acciderit,* the same as in the case of a reversion after an estate for life.

The reversion is generally said not to be assets, because the tenant in tail may bar it, and because it is not of any present value. Still it is part of the debtor's real estate, and its value does not signify. Whatever the value may be, his estate is universally liable, and the heir can only protect himself by showing that nothing has descended to him. The heir cannot devise it: any disposition of it, whether made by the will of the ancestor, or of the heir, is null and void as against creditors by the statute of 3 W. & M. c. 14. How could this be, if it were not assets till it came into possession? If that were so, it would not be liable till then. But it is antecedently liable; it waits the possession to become productive, but the liability attaches immediately.

The general doctrine, however, is that it is not assets; and though I should have thought that upon principle that could not be maintained, yet it would be hazardous to overturn so large a body of authorities. Lord Hardwicke in Kinaston *v.* Clark encountered the difficulty, and since that case, it must, I think, be considered that a reversion after an estate tail is in some measure assets. The main point in that case did not govern this; the question being whether pending the estate tail, the heir could devise the estate, and lord Hardwicke, though entertaining much doubt, determined that his devise was void under the statute.

The next case was that of Gifford *v.* Barber, 4 Vin. Abr. 452. There again the precise point did not arise, because the reversion had fallen into possession; but lord Hardwicke thought it liable to the judgment, because it was part of the real estate of the debtor, and was, therefore, subject to be charged and incumbered by him; an argument which tends to show its general liability. The next case is Smith *v.* Parker, which certainly is not to be considered as an authority on the point decided in it; lord Thurlow, in the case of Tweedale *v.* Coventry, and lord Alvanley, in Doe *v.* Hutton, 3 Bos. & Pul. 651, having shown that the judges were wrong in supposing that the debt of an intermediate remainderman attached upon

the reversion, he never having come into the seisin. That, however, does not break in upon the authority of what is said upon the general question, as to which lord chief justice De Grey said that the reversion expectant on an estate tail was not immediate assets, and that, therefore, it could not be extended, nor could the heir be compelled to sell it, but that it was assets *quando acciderit*, and the heir should then be chargeable. Thus it was assets finally convertible when in a shape in which it would produce value. Mr Justice Gould, said that it was not valuable assets, and Mr Justice Blackstone considered that the instant it vested in the heir it was assets by descent in his hands, although only dormant potential assets till it came into possession. I agree to the argument that this case furnishes an authority against an immediate sale, but at present I am referring to it with a view to the question whether the reversion is assets.

Upon the result of these authorities, I am satisfied that lord Hardwicke's view is correct, and that the reversion is to be considered assets from the moment that it descends to the heir, and is liable to the debt to the full amount of the value.

The question then arises, whether such a reversion ought to be sold immediately; and it is fairly contended that the authorities seem to make this distinction, that it cannot be sold till it comes into possession. I confess I am not satisfied that this rests on any sound principle, for the only reason suggested is, that the sale should be postponed out of consideration for the heir, that a higher price may be obtained. But I think that such considerations ought not to weigh. For the question is, to whom does the property belong? It is not the habit of the court to consider the interest of the heir when opposed to that of the creditors. They ought to have the fullest remedy; and upon what principle can the court refuse to give them the benefit of a sale, because another person, whose interest is secondary, and entirely subject to theirs, may be benefited by delay?

I think that the opinion upon this subject has partly arisen from considering what is clear in a court of law, namely, that a reversion after an estate tail is not immediate assets, but only future and potential; and thence it has been concluded, that in a court of equity it cannot be sold immediately. But that inference does not appear to me to be well founded, because it is negatived by what is admitted to be the rule as to selling reversions after estates for life.

It is a mistake to say that it is of no value; the value will be more or less according to the chances which it depends on. But it is of no consequence what the value may be. We are only to consider whose it is, and who has the right to determine whether it shall be sold or not. It would seem therefore that the circumstance of its not being applicable to the payment of debts by a court of law, does not decide what is to be done here; as in the case of an advowson, which yields no present profit, and is not assets at law, and yet is decreed to be sold in equity. The question then is, whether it does not follow from the determination that a reversion after an estate tail is to be considered as assets, that it is also saleable, sale being the peculiar remedy given by courts of equity for the purpose of accelerating the payment of debts. Upon principle, I should say that it ought to be so, as the heir only takes subject to the prior right of the creditors; and I should be inclined to decide that it should be sold, for I think that the old authorities are a good deal shaken by Kinaston *v.* Clark. When the point is settled with respect to a reversion after an estate for life, it appears to me to carry with it the same rule as to a reversion after an

estate tail. I am unable to distinguish the two cases upon principle, on the ground that in one the particular estate is more valuable, and the reversion less so.

If, therefore, there had been in this case an actually existing estate tail, I should have been strongly inclined to have decided that the reversion should be sold. But in fact the existing estate is for life only; the other estates are only contingent. If the defendant, the daughter of the deceased, should have children, and they should come of age, the entail may be barred, but not unless that should happen. Lord Thurlow, in Tweedale *v.* Coventry, notices this distinction; speaking of Smith *v.* Parker he says, that in that case the contingent uses never came into possession, and it was therefore not a reversion after an estate tail, but after an estate for life only. If the value of the reversion, and the probability of its being cut off, are in general to form reasons against proceeding to a sale, they certainly do not apply to this case, where there are so many contingencies, and where there is so great a chance of its coming into possession. It cannot be said that this reversion is of no value; on the contrary, it may be carried to market with every prospect of producing a considerable price.

For these reasons, though I have not been able to satisfy myself entirely, I think that in this case the reversion in question must be sold for the purpose of paying the specialty creditors. I do it, not upon general grounds, but upon reasons applying to this particular case only; but I have gone thus much at length into the general question as it is one of considerable difficulty.

Candler *v.* Candler.

Jacob, 225.

An agreement by an attorney to pay a share of the profits of his business to another person who is not an attorney, is not illegal. *Semble.*

Receiver of the debts due to a business, appointed at the suit of persons to whom a share of the profits had been assigned against a subsequent assignee of the debts.

August 15, 1821.

IN October 1815, Henry Candler, who for some time had carried on the business of an attorney or solicitor and conveyancer at Tadcaster, died, leaving ten children and a widow. By his will he appointed his widow to be his executrix, and gave her all his property, both real and personal, being satisfied that she would do strict and equal justice to all his children.

By a deed executed shortly after his death, dated the 25th of October 1815, between Henry Candler, his eldest son, and Mary Candler, the widow; it was recited, that from the love and affection which he (H. Candler) bore towards his mother and family, and in compliance with the wish and hope expressed by his father, and also under a due sense of the influence which his mother and family would retain with his father's clients and connexions, he had agreed with the said Mary Candler to carry on the business of an attorney or solicitor and conveyancer at Tadcaster, and to account with her for a moiety of the clear net profits, in consideration

of which she was to supply him with money sufficient to carry on the business. It was witnessed, that he covenanted to carry on the business so long as any of the other children should be living unmarried and under twenty-one, and within two months after the taking of every yearly account to pay to Mary Candler, her executors, administrators, or assigns, a moiety of the clear net gains and profits; and also to permit her to have free access to the books of account, to devote the whole of his time and attention to the business, to make out accounts annually, and to deliver to her a balance sheet of the net gains and profits. She covenanted to provide him with such sums as should be wanted by him, in order to carry on the business; and also to use her utmost endeavours and influence to induce her friends and connexions to employ him.

The business continued to be carried on upon the footing of this deed. Mary Candler died in March 1816, having by her will left her real and personal property to trustees, upon certain trusts, for the benefit of her children. The bill was filed in February 1821, by the younger children, for an account of her estate; it also sought against Henry Candler an account of the moiety of the profits of the business. It suggested that Henry Candler had made some assignment of the debts due to the business to W. Partington (who was also made a defendant), and prayed an injunction to restrain them from getting them in, and a receiver.

By the answer of Partington it appeared that H. Candler had by two deeds, dated in June 1820, assigned to F. W. Arkinstall all the debts then due, owing, or payable to him or to any person in trust for him, for or in respect of business done or moneys expended by him as attorney, solicitor, or conveyancer; and also all money secured or bequeathed, or due or owing to him or to any person in trust for him. These assignments were made by way of security for a debt due to Arkinstall. In September 1820, Partington paid Arkinstall's debt, and took an assignment of the security. He stated that he had no notice of any other persons being interested with Candler in the business, and he claimed the benefit of his security, insisting that by the statute 22 Geo. 2. c. 46, s. 11, the deed of 25th October 1815 was illegal and void.

An injunction had been granted by the Vice-Chancellor, and a motion for a receiver was now pending before him. A motion was made, on behalf of Partington, to dissolve the injunction.

Mr Heald and Mr Wakefield, in support of the motion.

The effect of the deed of October 1815, was to constitute a partnership in the business of an attorney between H. Candler and his mother; he was to manage the business, while she was to advance the capital and receive half the profits. Now by the act of 22 Geo. 2. c. 46, s. 11, for the regulation of attorneys, a person duly admitted to practise is subject to penalties for allowing his name to be used, or carrying on business for the benefit or profit of one who is unqualified. It applies in terms to this case. If persons not qualified to practise as attorneys might thus join themselves as partners in the business, the mischiefs which the statute was designed to obviate would be let in. In a late case of Tench *v.* Roberts, an assistant to a solicitor was by agreement to have a share of the profits; it was stipulated expressly that he was not to be a partner. He filed a bill for an account, and upon a demurrer being put in, the Vice-Chancellor was of opinion, that, notwithstanding the negative words, the agreement in effect constituted a partnership, and that it was consequently, under this

statute, illegal. The present case his honour thought was in some manner distinguishable from a partnership.

The Lord Chancellor. It strikes me that there are two questions here. If this deed be legal, it at any rate amounts only to a contract for a chose in action. Then what does it entitle the plaintiff to? Is there any thing in it which would give them a property in the debts themselves? Would not the debts, so long as they are not part of the profits, belong to Candler? If there be two assignments of a chose in action, he who has the first has the best equity. Now here the profits only are assigned to the plaintiffs; then what is there to prevent Candler from giving to his creditor those debts which are not affected with the character of profits. The other question is of very great importance: though the enacting words of the statute are very large, they may perhaps be considered to be confined by the recital. If a gentleman going out of the profession cannot make such an agreement as this, providing an annuity out of the profits of his business for his family, a great many transactions of an illegal nature have taken place.

Mr Wingfield, for the plaintiffs, contended that the deed in question was no infringement of the statute, not being within the reciting part. The object of the statute was only to prevent ignorant persons from intruding into the management of professional business. This deed contemplated nothing of that sort, as Candler was to conduct the whole business. The Vice-Chancellor suspended the order for a receiver, until the result of this motion should be known, and though the plaintiffs' assignment carries the profits only, yet they have a right to have the debts collected, that it may be afterwards ascertained what proportion belongs to them in the shape of profits.

The Lord Chancellor. The question here is one that cannot be decided upon motion. Supposing that any distinction exists between the effect of this deed upon profits, and its effect upon property not constituting profits, and another distinction between that part of the property which may become profits, and that which may not, the property must be ascertained; and, therefore, I think the best way will be to let the receiver in the mean time collect it.

On the construction of the statute I should be inclined to take the opinion of a court of law; for from the language of another act, a difficulty is thrown in the way of the construction which I should have been disposed to have put upon this, if it had stood alone. The clause is as follows: "and whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors, in any court of law or equity, do in conjunction with or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances intrude themselves into, and act and practise in the office and business of attorneys and solicitors, to the great prejudice and loss of many of his majesty's subjects, and the scandal of the profession of the law, be it therefore enacted, that from and after the 29th day of September, which shall be in the year of our Lord 1749, if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any-ways made use of, upon the account or for the profit of any unqualified person or persons, or send any pro-

cess to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereon upon oath, to the satisfaction of the court, that such sworn attorney or solicitor hath offended therein as aforesaid, then and in every such case every such attorney and solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the court to commit such unqualified person so acting or practising as aforesaid, to the prison of the said court for any time not exceeding one year."

If we are to construe the enacting part by the recital, there is no doubt that this lady did not intrude herself into, or act and practise in the office of an attorney or solicitor; but the point contended for, I suppose, would be, that her taking the profits would be evidence that she had done so.

The meaning of the clause undoubtedly is this (whether the terms used have gone further is another question), that qualified persons should not permit their names to be used by others, so as to enable them to appear as attorneys; and the question therefore is, whether the words "permit or suffer his name to be any-ways made use of upon the account, or for the profit of," &c. are not to be construed in connexion with the other words "thereby to enable him or them to appear, act, or practise," &c. so as to prevent it from going beyond the mischief that it was intended to provide for.

I should state that this statute, if the construction be such as is contended for, has been violated over and over again, and by the best men in the profession. It has happened to me to know, that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that, consistently with the policy of the law, agreements could not be made by which they contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the court of king's bench was of a different opinion, though I never could entirely reconcile myself to their doctrine(*a*).

Unfortunately for the construction I should put upon this act, there is a statute, the 41st of Geo. 3. c. 76, which shows that there is no greater evil than that of throwing in a great number of words. The tenth section of that act is as follows: "that from and after the said 1st day of August if any public notary shall act as such, or permit or suffer his name to be in any manner used for or on account, or for the profit and benefit of any person or persons not entitled to act as a public notary, and complaint shall be made in a summary way to the court of faculties wherein he hath been admitted and enrolled upon oath to the satisfaction of the said court, that such notary has offended therein as aforesaid, then and in such case, every such notary so offending shall be struck off the roll of faculties, and be for ever disabled from practising as a public notary, or doing any notarial act." Then follow these words: "save and except as to any al-

(*a*) See Bunn *v.* Guy, 4 East, 190.

lowance or allowances, sum or sums of money that are or shall be agreed to be made or paid to the widows or children of any deceased public notary or notaries, by any surviving partner or partners of such deceased notary or notaries." From this it may be argued that the insertion of these words proves that it was the notion of the legislature that without them a notary could not have made such a provision. If I were to state my own opinion (but the point must be decided elsewhere), I should say, I think these words were very unnecessarily inserted here. I think that looking at the recitals both in this act and the other, that such a transaction is not within the meaning of the legislature, even if those words were not inserted. And I cannot help saying what I said in the case of the Jersey leases, that a long course of practice sanctioned by professional men, is often the best expositor of the law.

I cannot, therefore, go the length of saying, without the opinion of a court of law, that the plaintiffs have no interest under this deed; it does not follow that Partington has no interest. Thus, if there was nothing left but one debt of 100*l.*, and if the whole of it was profit, Partington would be entitled to half of it. And so, on the other hand, if the plaintiff's share of profits could be satisfied without resorting to that debt, the assignment of it to Partington would be good against the plaintiffs, who, if it be debt, cannot claim it as debt, but only as constituting profits. On the whole, therefore, if the Vice-Chancellor is about to appoint a receiver to collect the property, I see no reason to interfere.

Jenkins *v.* Sandys.

Jacob, 233.

The messenger having defendant in custody under an attachment, and having afterwards let him go at large upon his undertaking to pay the costs, cannot use the process to compel payment.

Aug. 15, 1821.

MR KOE moved on behalf of the messenger for a writ of habeas corpus to bring up the defendant, in order that he might be committed. The defendant had been taken under an attachment for want of an answer; and being in the custody of the messenger, he had by consent of the plaintiff's solicitor been permitted to remain in custody at his own house, and afterwards to go at large upon his own undertaking to pay the costs. He had, however, not paid the messenger's costs; and the question was, whether the latter was entitled to the process of the court to compel payment.

The Lord Chancellor. If the messenger thinks proper to let him go at large upon his undertaking, he must bring an action. He cannot have this remedy upon a bargain made out of court in this way. If it had been by leave of the court it would have been another thing.

Mr Wakefield, against the motion.

Ex parte Earl Digby, in the matter of the Duchess Dowager of Norfolk.

Jacob, 235.

A feme covert, tenant for life, with power of charging, and with the ultimate limitation to herself in fee, makes a charge, and covenants for payment. She survives her husband, and the intermediate limitations having failed, the estate on her death, descends to her heir. He is not entitled to exoneration out of her general personal estate.

Quære. Whether he is entitled to exoneration out of personal estate settled to her separate use.

In general, if a tenant for life, with power of charging, makes a charge, his personal estate is not liable to exonerate the land.

Aug. 17, 1821.

BY the settlement made in March 1771, previously to the marriage of the Honourable Charles Howard (afterwards Duke of Norfolk) with the Honourable Frances Fitzroy Scudamore, the estates of the latter were settled (subject to two rent charges) to the use of herself for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of her intended husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of such son of the marriage as she and her intended husband should appoint, with remainder to the first and other sons of the marriage successively in tail male, with remainder to such uses as she should appoint, with remainder to the heirs of her body, with remainder to her right heirs. The settlement contained a power to the said F. F. Scudamore, during the lives of herself and her husband, to borrow at interest any sums not exceeding 25,000*l.* in the whole, and by deed (executed and attested as therein mentioned) to charge the estates with the payment of such sums, and to secure them by creating a term of years by way of mortgage, to be made redeemable on payment of the sums charged with interest, by the person or persons for the time being entitled to the freehold and inheritance; and she and her husband were by such deed to undertake and agree to keep down the interest.

Under the above power the estates were mortgaged in May 1774, by the said Charles Howard (then Charles Howard Scudamore, he having taken that name), and his wife to S. Fell, for a term of 1000 years, for securing 5000*l.*, which was recited to have been advanced on the application of the wife, and to have been paid to V. Eyre as a trustee for her separate use. Charles Howard Scudamore and his wife covenanted for payment of the mortgage money and interest; and the former also gave his bond for it.

There was no issue of the marriage. Charles Howard Scudamore succeeded to the title of Duke of Norfolk: his wife survived him, and, after his death, in the year 1816, a commission of lunacy issued against her, under which she was found a lunatic.

Under an order of reference made in the lunacy, the Master had reported that it would be for the benefit of the lunatic that the mortgage should be paid off, and that the term of years for securing it should be assigned in trust, to be disposed of as the Lord Chancellor during the lunacy

[Ex parte Earl Digby.]

should order, or as the lunatic, if she should recover, should direct, and subject thereto in trust for the lunatic and her heirs, and to attend the inheritance. A petition was presented on the part of the heirs at law, praying that the mortgage might be paid off, and the term assigned as proposed by the Master. Another petition was presented on the part of the next of kin, praying that if the 5000*l.* was paid off, an assignment might be taken of it and of the securities, and that they might be kept on foot, and considered as personal estate, without prejudice to the persons by whom, or the funds out of which the same should be ultimately borne or paid.

These petitions came on first in August 1820, 1 Jac. & Walk. 640. The duchess having since died, it was agreed that the petitions should be brought on again by consent, for the purpose of taking the opinion of the court on the question whether the mortgage was to be paid off for the benefit of the heirs. On the opening of the case, it appeared that there was a difficulty in the way of hearing the matter on petition by consent, from some of the parties being *femmes covert;* to obviate this, it was arranged that a bill should be afterwards filed, and a decree made.

Mr Hart, Mr Shadwell, and Mr Spence, for the heirs at law.

The charge upon the estate of the duchess having been paid off out of the surplus rents, the question now raised between the real and personal representatives is, whether that charge was of such a nature as to entitle the former to have it satisfied out of the general personal estate, which consisted of those surplus rents. The duchess was tenant for life, with power of charging, and with the reversion in fee; the intermediate limitations having failed, the estate comes to her heir, charged with the incumbrance created by her. The general principle appears to be that when the estate devolves on the heir charged or chargeable with an incumbrance created by the ancestor, he is entitled to be exonerated out of the personalty; but when it came to the ancestor subject to the incumbrance, his personal property is not considered responsible; the ground of the distinction being, that in the former case it is his personal debt, and in the latter not. Lord Mohun's case, 2 Freem. 204. Lutkins *v.* Leigh, Cas. Temp. Talb. 54. If an analogous rule is to be applied here, it introduces the question whether the 5000*l.* is to be treated as the debt of the duchess. Now though her coverture would disable her from contracting debts, yet the settlement aims at giving her to a certain extent, the character of discoverture; the power enables her to borrow, which implies a loan, and, consequently, a debt. The demise is not made the sole or primary security, as the mortgagee took a bond from the duke, and a covenant from both; he, however, is to be considered as a surety, it being recited that the money was borrowed for her occasions. They also cited Tullitt *v.* Tullitt, Ambl. 370.

The Lord Chancellor. In general, if a tenant for life, with power of charging, makes a charge, his general personal estate will not be liable to exonerate the land; and in general, if he pays it off, he becomes an incumbrancer on his own estate. Thus, if there be tenant for life, with power of charging, with remainder to trustees to preserve contingent remainders, with other remainders over, and the reversion to himself; if he makes a mortgage, and afterwards pays it off, he is himself an incumbrancer on the estate, even without taking an assignment. Then if the duchess paid this off, does not she become an incumbrancer?

[Ex parte Earl Digby.]

The cases of exoneration go upon the ground that the money is the debt of the person making the mortgage at the time. It is his debt, whether there is or is not a covenant for payment; if there is a covenant, it is a specialty debt; if not, a simple contract debt. The question here is, whether at the moment the charge was made, it was a personal debt of the duchess's; and with reference to that it is material to observe that she enters into a covenant for payment. But still that did not make her liable; and is there any case in which the heir has been relieved from the charge, where no demand could have been made on the ancestor for payment?

It was then suggested on the part of the heirs at law, that the effect of the covenant, according to Bullpin *v.* Clarke, 17 Ves. 305, was to make the sum borrowed a debt as against the separate estate of the duchess; and, therefore, that if she had any separate property, it would be liable to exonerate the debt from the estate.

The Lord Chancellor. The 5000*l.* was disposed of; that did not remain as her separate estate. If it should appear that she had any other separate estate, the question might be considered. It would depend upon whether the personal security was meant to be the primary security, or only collateral.

Mr Wetherall, Mr Wingfield, and Mr Pepys, for the next of kin.

Bluett *v.* Jessop.

Jacob, 240.

In a creditor's suit, it appearing that there were no assets applicable to the payment of the plaintiffs' debts, the plaintiffs ordered to pay the costs.

But other creditors, entitled to a specific lien, having proved, ordered to pay the costs of the proceedings relative to their debts.

The direction for creditors coming in under a decree, to contribute to the costs, not enforced in practice.

Rolls.—August 14, 16, 20, 1821.

THIS was a bill by four persons claiming to be simple contract creditors of James Spedding, deceased, against his executor: the corporation of London, who owed to the testator a sum of 630*l.*, were also made parties, and that sum was paid into court. The executor by his answer stated that the testator died insolvent; some part of his property having been taken in execution, and the rest assigned in satisfaction of specific debts. By the decree the usual accounts were directed.

The Master by his report found that one only of the plaintiffs was a creditor of the testator. Two other debts were proved; one of which was to the defendant the executor, and J. Wright, his partner, who claimed under two assignments a lien upon the fund in court arising from the debt of 630*l.*, and upon some other property of the testator's; another debt was due to B. and S. Granger, who also claimed a lien on the fund in court; the Master reported that B. and S. Granger were entitled to the first lien

on it; he found that there was no property of the testator except that which was subject to the lien for these two debts, and which was entirely exhausted by them. The defendant, the executor, had died pending the suit, which was revived against his representatives. It now came on for further directions.

Mr Wingfield and Mr Roots, for the defendant, contended that the plaintiffs ought to pay the costs of the suit.

Mr Roupell, for the plaintiffs, argued that the costs ought to be paid out of the fund in court. At law where an action is brought against an executor by a creditor, if he has no assets, the plaintiff takes a judgment *quando acciderint*, and the defendant pays his own costs. At least that should be the case here. But in addition to that, the defendant and the Grangers have come in and proved their debts under the decree, and have the benefit of it; by payment out of the fund which the plaintiffs have brought into court.

August 16.—The Master of the Rolls. The question here is, what is to be done in a creditor's suit where it turns out that there are no assets. I do not find that there has been any decision of it. If we consider the point stripped of every circumstance that can throw blame on either side, we should say on general principles that the result ought to be that the plaintiff should pay the costs. The plaintiff ought, before he proceeds to put the defendant to a certain expense, to consider whether he will be able to obtain any relief.

Then is there any difference with respect to an executor? It is said that by proving the will he takes on himself this liability, and must at least pay his own costs. But even if that were so at law, it does not follow that it must be the same in equity. An executor when plaintiff at law is exempted from payment of costs, because the statute(*a*) has been decided not to apply to that case; it being considered not to operate with respect to a person suing in *autre droit*, who may be supposed not to be so well acquainted with the subject of the action. Bull. N. P. 331. Cro. El. 503. But when he is a defendant, it depends upon the plea. If he pleads no assets, and the contrary is found, he pays the costs. It may vary with some particular pleas; in general when he succeeds on all points he is entitled to his costs. In equity the proceeding is different. If the creditor is previously ignorant of the state of the assets, still if where the executor states on oath that there is nothing to distribute, he chooses to go on, the consequence of deciding that in such a case the executor is not to have costs, would be that as other creditors may bring other suits, harassing him in the same manner, he might be exposed to ruin. I cannot accede to such a principle.

In this case there are no peculiar circumstances to protect the plaintiffs. Three of them appear not to have been creditors at all. The answer disclosed that there was not a particle of property undisposed of: but they were not satisfied, and insisted on the account. The Master by his report states how he conceives the Grangers and the assignees of the debt to be entitled: but as to the plaintiffs, it is clear that there is nothing to pay them, nothing being left to pay even the costs.

As to the fund in court, we cannot make it bear the costs. It was

(*a*) 23 Hen. 8. c. 15.

brought into court by an order in 1811, but it was not the property of the testator: it belonged to other persons, having a right independent of any thing the court could do; the right to it must be discussed between them. I think, therefore, that the plaintiffs must pay the costs.

Mr Roupell suggested, that by the decree creditors coming in were to pay a proportion of the costs.

The MASTER of the ROLLS remarked, that that was the common form of such decrees, and it had been sometimes a question whether the plaintiff was not entitled to contribution; but he believed that in practice no one had ever heard of any such thing being done.

August 20.—The cause was mentioned again with reference to the disposition of the fund remaining in court, when the decree was made, directing it to be paid out to J. Wright and to B. & S. Granger, in the proportions in which the Master reported them to be entitled. It was ordered that the costs of the late defendant W. Jessop, and the present defendants, his executors, of the proceedings in the Master's office, by J. Wright and B. & S. Granger in substantiating their respective liens on the fund should be paid by them respectively, and that the rest of the costs of the defendants should be paid by the plaintiffs.

Reg. Lib. A. 1820, fo. 2409.

Bingham *v.* Dawson.

Jacob, 243.

Leave to file a supplemental bill in the nature of a bill of review, to introduce new evidence, refused, where the proper means of searching for it had not been used previously to the decree. August 21, 1821.

THE bill in this cause was filed in 1813 by the vicar of Great Hall in the county of Lincoln against several occupiers for tithes. The defendants by their answer insisted upon an immemorial non-payment of tithe of wool and lambs; a decree was however made in 1817 for an account of the small tithes including these articles. From this decree the defendant Dawson had appealed; he now presented a petition, representing that he had since the decree discovered that the tithe of wool and lambs was of right payable to the impropriate rector, and was covered by an ancient composition paid in lieu of the rectorial tithes. The evidence of these tithes having belonged to the rectory consisted of a grant from the crown in the reign of James the first, and of certain records in the augmentation office, which had only recently come to the defendant's knowledge. The petition prayed leave to file a supplemental bill in the nature of a bill of review, for the purpose of introducing the new evidence at the hearing of the appeal.

The petition was first heard by the Vice-Chancellor, who dismissed it with costs; the defendant appealed from this order.

Mr Wetherall and Mr Wilbraham, in support of the petition, cited Lord Portsmouth *v.* Lord Effingham, 1 Ves. Sen. 430.

Mr Heald and Mr Roupell, on the other side.

The Lord Chancellor. It seems to me that the Vice-Chancellor was quite right. If circumstances of this kind are to form grounds for bills of review, these applications will be constant and eternal. I say nothing as to whether these matters could be evidence or not; the question is only whether they are to be made the foundation of a bill of review. The vicar, I suppose, must have made his case thus; that he had received all small tithes that had been paid, which the court of exchequer has held *primâ facie* entitles him to all small tithes. It is now said that there was an agreement to pay a composition in lieu of rectorial tithes, and that it appears from documents at the augmentation office, that the tithes in question are included in the rectorial tithes. But is there any case of a vicar's bill, where the first step taken is not to search in these offices? If that had been done, there would have been a proper defence? If it is to be laid down that a party may go on to a decree without looking for a defence, and may then make applications of this kind, there will never be an end to them. It is not a case of a search made, and a miscarriage in that search, but it does not appear that there was any search at all(*a*).

Petition dismissed with costs.

Lyons *v.* Blenkin.

Jacob, 245.

Jurisdiction of the court of Chancery to control the authority of a father over his infant children.

Application of a father, praying that his children might be delivered up to him by an aunt, who was guardian of their fortunes, with a discretionary trust for their maintenance, and with whom he had permitted them to reside for a long time, refused under the circumstances.

Motion to stay a suit commenced in the name of infants for accounts of their property, upon affidavits, representing that the suit was not for their benefit, refused.

Feb. 28; March 1; April 15, 1820; June 4; Aug. 28, 1821.

MARY BEATSON by her will dated in May 1815, gave to her daughter Mary Burnham, amongst other things, a moiety of freehold estate, the other moiety of which she gave to her three grand-daughters, Mary Lyons, Frances Lyons, and Jane B. Lyons in fee, as tenants in common, and she declared that her daughter Mary Burnham should during her life have the sole and separate management of this estate. She devised other lands and gave pecuniary legacies to each of her three grand-daughters respectively, directing the legacies to be paid to them by her executrix on their attaining twenty-one, with benefit of survivorship between them in the event of dying under the age unmarried. The residue of her real and personal estate she gave to her daughter Mary Burnham. The testatrix then empowered her daughter Mary Burnham, during the minority of her grandchildren, to receive the rents, issues, and annual proceeds of their respective

(*a*) Ord *v.* Noel, 6 Madd. 127.

shares, and to pay and apply such part thereof as to her should seem reasonable and proper, towards their maintenance and education; and the surplus, if any, of the annual proceeds, she directed to be invested in real securities, in order that it might accumulate for their benefit. She declared that the receipts of her daughter Mary Burnham were to be sufficient discharges, and then proceeded thus: "But in case my said daughter Mary Burnham shall happen to die during the minority of any of my said grand-children, then, and in such case, I appoint S. Park of, &c., guardian to my said grand-children during their respective minorities, and I entrust to her the management and disposition of the estate and effects hereinbefore bequeathed to them, in like manner as is hereinbefore expressed and declared with respect to my said daughter Mary Burnham. I appoint my said daughter Mary Burnham, sole executrix of this my last will and testament, and also guardian of all my said grand-children."

The testatrix died in March 1816. Her three grand-children (the infant plaintiffs) were the issue of the marriage of James Lyons with one of her daughters, who died in the year 1809. The father of J. Lyons was still alive. In the year 1805 the testatrix having offered to maintain and provide for the eldest of the infants, she had been committed to her care; and on the death of the mother in 1809, the other two children were also placed by their father with the testatrix. They continued till the time of her death to reside with her at her house near Hull (excepting when occasionally absent upon visits to their father, or at school), and the expenses of their education were defrayed by her. Their father J. Lyons had in the mean time married again.

After the death of the testatrix, the infants continued to reside in the same manner under the care of their aunt Mary Burnham; in February 1819 she married the defendant Blenkin. By provisions in her marriage settlement, she reserved to herself the management of the infants and their fortunes. About this time differences arose between her and J. Lyons: he required that his daughters should be delivered up to him, and called for accounts of their fortunes, and in November 1819, filed a bill in their name, as their next friend, against the defendants Blenkin and his wife, praying the accounts, and insisting that his daughters ought to be placed under his care; and not being of ability to maintain them, a proper sum should be allowed to him for that purpose. In Hilary term 1820 he obtained upon an *ex parte* motion in the cause, a writ of *habeas corpus* directed to the defendants to bring up the bodies of the infants(*a*). To this writ the defendants made a return, certifying that the infants were detained by, and were under the protection of the defendant Mary Burnham, for the purpose of their being educated and maintained by her as their guardian, under the will of their grand-mother Mary Beatson deceased, and according to the trusts and directions for those purposes contained in her will. Affidavits were filed in support of the return, and on the part of J. Lyons against it.

It appeared that the father of J. Lyons was a dissenting minister; he was formerly a baptist, but had some years before become an unitarian. He resided at Chester, and had no regular employment, having resigned the situation of minister to a congregation at that place. His income was stated to consist of about 400*l.* per annum, chiefly arising from the property of his second wife. The infants were of the respective ages of 19,

(*a*) Reg. Lib. B. 1819, fo. 208.

14, and 12 ; they had been educated by their aunt in the baptist persuasion, which she and her husband professed. In a letter written by them, and in an affidavit made by one of them, they expressed strongly their desire to continue with the defendants. It was represented that their father's home could not become a comfortable residence for them. Some imputations were thrown out by each party against the other, which were met on both sides by testimonials of respectability and good character.

Mr Hart and Mr Spence, for J. Lyons.

No ground is made out for depriving the father of his natural right to the custody of his children. His moral and religious character is proved to stand high. There is, therefore, no objection to him on that head on which the court has sometimes interfered in former cases. As father he has the right of exercising his own discretion, as to the residence and the mode of education of his children, and the motives that have influenced his discretion in this instance are extremely natural. He was willing that they should enjoy the benefit of living with their grand-mother ; it being her desire, and her large property rendering the prospect advantageous to them : he did not object to their continuing with their aunt until her marriage, but not having equal confidence in her husband, he thinks it necessary for their happiness that they should return to the roof of their natural protector. It is asserted that the children themselves prefer their present abode ; what their real and unbiassed sentiments are, may still be doubtful, but if the fact be as it is represented, it furnishes a stronger proof of the mischiefs of a mode of education which has estranged their affections from their parent.

Mr Agar and Mr Duckworth, for the defendant.

The father who makes this application has for many years abandoned these children to the care of others. No objection was made, and even now there is no complaint, except as to the marriage of the aunt. The question now is, whether they are to be compelled to exchange the protection of an aunt, with whom they have spent the greatest part of their lives ; to whom they have become attached, and whose religious opinions are the same as their own, for that of a father, whose narrow income and domestic circumstances render his house unfit for young ladies of property and education, and who having till now neglected them, is only stimulated to come forward by the hope of procuring some allowance from their estates. From the terms of the grandmother's will, no allowance for maintenance can be made, except at the discretion of Mrs Blenkin, and it is not, therefore, likely that the father, if they live with him, will procure any assistance from that quarter. He will, therefore, be entirely without the means of adequately supporting them.

The court will be influenced by these considerations, not attending solely to the legal right of the father, but looking to the benefit of the children, as a ground for controling it. He will not be permitted to sacrifice their interests. Creuze *v.* Hunter, 2 Cox, 242, 2 Brown, C. C. 500, n. ed. Belt(*a*), Skinner *v.* Warner, 2 Dick. 779, 4 Bro. C. C. 101,

(*a*) In this case the petition was presented by Elizabeth Hunter, wife of the defendant Charles Orby Hunter, and mother of the infant defendant Thomas Orby Hunter. It stated that the defendant C. Orby Hunter being in very embarrassed circumstances, had several years before quitted this country and resided abroad, where he continued until lately : that he had been outlawed at the suit of one or more of his creditors, and the outlawry had not been reversed; that

[Lyons *v.* Blenkin.]

Wilcox *v.* Drake(*a*). In *ex parte* Hopkins(*b*), the court refused to deliver up the infant, upon her own statement, though only thirteen years of age, that she preferred her then residence.

In the last case the reporter adds a *quære* as to the use of the writ of *habeas corpus* in cases of this description; and indeed the writ appears only to be proper in cases of forcible detention and illegal constraint. It cannot be applied, where the residence of the party is voluntary. See the case of the Hottentot Venus, 13 East, 195. It cannot properly be employed for the purpose of removing persons from a place where they reside willingly, and are perfectly happy, to put them under a disagreeable and injurious constraint.

Mr Hart, in reply, contended that the form of the application was regular. In Ex parte Hopkins the order was refused because no bill had been filed, but the Lord Chancellor speaks of the writ of *habeas corpus* as the proper mode. With respect to this writ the court acts on common law principles. In a late case (that of lord Westmeath's children(*c*), the proceeding was by *habeas corpus*.

he had left the petitioner and the infant without any provision, and they had been supported, first by her father, and subsequently, her father having died, by some property left to her separate use by his will: that in the year 1786, the infant being then eleven years of age, had been placed at the school of Mr Adams; that the defendant Charles Orby Hunter had no income to enable him to support the infant; that he had lately returned to this country, and intended to remove the infant from school, and to carry him abroad; he had lately written a letter to the petitioner's solicitor, containing some proposals, and intimating that if she did not acquiesce in the propositions which he made respecting his son, she must not be surprised if he took such methods as he thought right respecting them. Upon lord Hawke and Mr Adams undertaking to take upon them the care and superintendance of the infant's education, it was ordered that the infant should be placed under their care, and that the defendant Charles Orby Hunter should be restrained from removing the infant from the school and situation in which he was then placed, and from carrying and taking him abroad, out of the jurisdiction of the court, and from using or employing any means for that purpose. Reg. Lib. A. 1789, fo. 456. Sub. nom. Creuze *v.* Louth.

(*a*) This case is thus reported in Dickens, vol. ii. p. 631. "The father being insolvent, it was referred to the Master to approve of a person to have the care of his infant son." The name of the case is, Wilcox *v.* Darker, and it appears by the statement in the register's book, that the infant, who was about nineteen years of age, was entitled to a legacy of 5000*l.*; his father was in a low situation of life, and in insolvent circumstances. The petition presented by the infant, represented that his father was indebted to him in a sum which he was unable to pay, and an order was made *by consent* for the father to authorize another person to receive the dividends of the infant's fortune, and *also by consent* for the Master to approve of a proper person to have the care of him, and to inquire whether he had contracted any debts for necessaries. Reg. Lib. B. 1783, fo. 211, 496.

(*b*) 3 P. W. 152. See also De Manneville *v.* De Manneville, 10 Ves. 52. Whitfield *v.* Hales, 12 Ves. 492, and the observations of lord Hardwicke in Butler *v.* Freeman, Ambl. 501.

(*c*) In this case an application was made by the earl of Westmeath, on the 16th of June 1819, by petition, stating his marriage, and that he had two children, lady Rosa Nugent, aged five years, and lord Delvin, aged seven months; that he and his wife had been living together in the same house, and the children with them, until the 14th of June, when the countess of Westmeath, without his knowledge or consent, took the care and custody of the children from, and sent them from his house, and caused them to be taken to the house of the marquis of Salisbury, her father, and placed them under the care and protection of the marchioness; and that she also, without sufficient cause or motive, absented herself and had not returned, though he was willing to receive her, and maintain and support her and the children. Upon this petition the Lord Chancellor ordered a writ of *habeas corpus* to issue, returnable immediately, directed to the

The objections urged cannot prevail against the legal right of a parent; that right cannot be forfeited by his entrusting for a time the care of his children to a relation. His income, though small, is sufficient to maintain them; and it is immaterial whether it be much or little; the father's right to his children cannot depend upon the amount of his property. His situation in life is equal to that of the defendants, and his character stands unimpeached.

The Lord Chancellor thought that the best mode of deciding it would be to have a short petition presented. It is not necessary to enter into the consideration of what was clearly settled in the case of young Mr Powell(*a*), and in that of the young lady whom Mr George Selwyn provided for(*b*). It is certain that the court will interfere against the acts of a guardian, if acting in a manner inconsistent with his duty; and it is equally clear that the court will control a parent if acting in a manner in which he should not.

I disavow any inquiries into the religious opinions of either party. As I understand the case, the grandmother made her will, and by it gave a moiety of one estate, and some other estates, to these young ladies; and then, taking it for granted that she had power to appoint a guardian, expressly directs that their aunt shall be their guardian, and has given the management to her, perhaps with the view of excluding the father. She has the whole authority over the property, and during their minority is to apply to their maintenance what to her may seem proper. It does not

marchioness of Salisbury and the countess of Westmeath, to bring before him the bodies of the infants. Reg. Lib. A. 1818, fo. 1359.

By the return made by the countess of Westmeath to the writ, it was stated that she lived separate and apart from her husband; that the infants were not under imprisonment, restraint, or duress of any kind; and that they were infants of tender years, and incapable of managing and taking care of themselves; and that she had the care and custody of their persons, by virtue and under the authority of a certain deed, bearing date the 17th day of December 1817, executed by the said earl of Westmeath, their father; and that she bore and paid the costs and charges of their maintenance and education, by means of a certain other deed, bearing date the 30th day of May 1818, also executed by the said earl of Westmeath; that the infants always had been, and then were tenderly and properly nurtured and taken care of by her; and that it was for their benefit and advantage that they should remain in her care and under her custody; and that the said earl of Westmeath had no place of residence of his own to receive and place the infants in, he being then resident in the house taken by her for her separate use, and under a contract made by her own name with the owner, and paid for by her out of her separate income, and which she had only quitted to avoid altercation with the said earl, until she could be restored to the exclusive enjoyment thereof by a court of equity. The deed of the 17th of December 1817, contained a clause, by which, in the event of a separation between the earl and countess, the former covenanted to permit their daughter, and such other children as they might have between them, to be and reside with the latter and to be educated under her care and superintendance. By the deed of December 1818, a provision was made for the separate maintenance of the countess, and an annual allowance was agreed to be raised and paid to her for the maintenance of the infants(1).

Affidavits were filed on both sides, and after hearing sir George Hampson for the earl of Westmeath, and Mr Hart on the other side, the Lord Chancellor made an order for the delivery of the infants to their father. Reg. Lib. A. 1818, fo. 1534.

(*a*) Powell *v.* Cleaver, 2 Bro. C. C. 499.

(*b*) Fagnani *v.* Selwyn, post.

(1) See ante, page 55.

[Lyons *v.* Blenkin.]

enter into the question whether this can be brought within the authorities that I have been alluding to; but arguing it to that extent, will the court permit a parent, who cannot educate his child in a manner suitable to the property which the child derives from the bounty of another, to withhold from it the education to which it is entitled? This jurisdiction is to be very carefully exercised; and it seems to me that the best way to decide the matter, with reference to these principles, and considering the question whether I have jurisdiction by *habeas corpus* out of term(*a*), (some think I have, some that I have not,) will be to have it done upon petition(*b*). I should like also to know the amount of the property, and the circumstances of the father. There must be some ground of imputation on him, or of interest in them, to warrant the court in interfering.

A petition was accordingly presented by J. Lyons praying for the infants to be restored to him, and some further affidavits were filed. It appeared that the property of the infants amounted altogether to about 600*l.* per annum.

April 15.—The Lord Chancellor. In this case I propose directing a reference to the Master to inquire by whom, and at what expense the infants have hitherto been maintained and educated, and whether the father is of sufficient ability to educate them in as beneficial a manner; and if not, to approve of a scheme for their education during their minorities. The reason why I propose to do this is, that I desire to put upon the record some of those circumstances that induce me to act in a manner different from what I should upon a *habeas corpus*.

The view I have taken of the case is of this sort. Here is a fund provided for the maintenance and education of these children, and I think I am properly warranted by authorities in asserting that if a testator thinks fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period makes a further provision for them, and the father permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education, which he himself cannot afford to give them, he is not (unless I greatly mistake the matter) according to the principles of this court, at liberty to say that he will take them from the course of education which they have hitherto pursued, and that too at a period approaching to maturity of age. He is not at liberty

(*a*) See Crowley's case, 2 Swanst. 1.

(*b*) In a case which was heard in private before the Lord Chancellor in August 1831, his lordship observed, that where the infant was a ward of the court, there were many circumstances to which he could give attention, which could not weigh with him upon a *habeas corpus* alone, without any cause in court. He apprehended that the jurisdiction which he had upon a *habeas corpus*, was exactly the same as if it was before a judge, and he apprehended that a judge attended to nothing but cruelty or personal ill-usage to the child, as a ground for taking it from its father. But where there was a cause in court, there were many other considerations; for instance, in the case before his lordship, it was alleged that there was a lady who was an aunt of the children, who had made an appointment in their favour, which she would not continue, if they resided with their father. His lordship could not attend to that circumstance on a writ of *habeas corpus*, but in a cause it might have some weight; for the court would not in general permit the father to disappoint the expectations of his children.

The attorney-general and Mr Raithby, were counsel for the father, Mr Heald and Mr Jacob, on the other side.

to say, I will alter the course of education of my children by applying more scanty means to the purpose, and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had; and in consequence of which their views in life are very different from what they would have been without it.

With the religious tenets of either party I have nothing to do, except so far as the law of the country calls on me to look on some religious opinions as dangerous to society. Not entering into that point at present, I will only mention by the way, that as to one of those opinions the state of the law appears to me to have been a good deal mistaken.

The mere circumstance of the aunt, the person who has given to her a discretionary power in the nature of a guardian, having married, is not one to call on the court to alter the care thrown over the children; nor, on the other hand, is the father's marriage a circumstance to be urged against his claim. But the two things I have been looking at are, first, whether under this will the father could or could not compel the aunt to exercise the discretion of making an allowance for their maintenance, the fact being known that he has permitted them to be brought up with that expectation as to future station in life which their education hitherto has led them to form; and if not, whether, according to the rules of this court, he can be permitted to place them where they can no longer have that species of education which they have hitherto had, with a view to fit them for the station in life which they have been led to expect; or whether I am to take a middle course, and consider that their having the benefit of education must still be subject to the regulation of their father, so as to provide for its being rendered subservient to the cultivation of that duty, and affection to their father, without which being planted in their hearts, nothing else that may be sown there will be likely to produce good fruit.

It is with these views that I have a great deal of difficulty as to removing these children from the place and condition they now are in; and I shall be ready to afford you an opportunity of addressing me to remove the views I have taken, if they cannot be supported.

I find that the authorities have gone further than I thought they had; I speak not of cases that have been cited, but of others not usually mentioned. There were, I believe, some cases in Lord Northington's time in which he considered that the court would reserve power over a father, not only if he accepts a bounty given to himself, but if he avails himself of a bounty given for the maintenance of his children, which he must otherwise have provided at his own expense(*a*).

(*a*) COLSTON *v.* MORRIS.

A sum of money being left to an infant, with a direction that her education should be committed to the trustees, and a legacy to the father, on condition of his not interfering in it, the condition enforced, by requiring his undertaking not to interfere.

J. Morris, by his will, gave 10,000*l.* to trustees upon certain trusts for the infant plaintiff, Juliana Colston, his granddaughter; and on trust to pay out of the interest of it an annuity of 100*l.* to her father, till she should attain twenty-one, or marry with consent of the trustees; and he gave and committed, so far as it was in his power so to do, the guardianship, custody, care, tuition, management, and education of the plaintiff to the trustees, and the survivors and survivor of them; and he gave to her father a legacy of 2000*l.* By a codicil he declared, that if the father or his wife should ever interfere with the management and direction of the trustees

[Lyons *v.* Blenkin.]

Nobody can doubt that if I give a provision to your child, it does not give me or any one else a right to control your care of her; not at all; but, on the other hand, if when she is young I was to give her a considerable maintenance during her infancy, which you could not have supplied, and a large fortune afterwards, and you the father permit her to take the advantage of that education which could not have been afforded but through my gift, could you afterwards stop short and say that she should no longer have that advantage? Under such circumstances the court would inquire what was most for her benefit.

One point in this case which deserves great consideration is, whether if the father took the children, he would have a right to call for an allowance for their maintenance?

June 4.—An application was afterwards made, on the part of the father, for a re-hearing, and the case was in part re-argued. It then stood over for some time, and was now brought on again, and it was stated in affidavit that the eldest of the infants had received the addresses of a young man who was represented to be in a lower situation of life. This was urged as an additional reason for placing the infants under the care of their father. The defendant Mrs Blenkin, stated that she had used her utmost endeavours to break off the connexion.

At the same time a motion was made on the part of the defendants that the bill might be dismissed, or that all proceedings in the cause might be stayed. In support of the motion affidavits were made by two persons who had viewed the estates of the infants, and stated their opinion that they were let at the utmost advantage. They stated that they had inspected the accounts relating to their property, which had been accurately kept, and from which it appeared that their fortunes had been improved in the most beneficial manner; some portion of their expenses had been defrayed by their aunt Mrs Blenkin herself. A certificate was also signed by the two eldest of the infants, expressing their satisfaction with the

respecting the education of his granddaughter, then he revoked the legacies left to him, as it was his wish that he should not have any control over her.

The father, by his answer, submitted that the condition or prohibition annexed to the legacy to him was for want of a bequest over to be considered as *in terrorem* only and void. He was desirous of having the care of his daughter, and submitted that she ought to be placed under his care.

The decree made by the Vice-Chancellor on the 22d of May 1819, directed a transfer of the legacy of 10,000*l.*, and on the father undertaking to give up and abandon all interference with the management and direction of the trustees in the education and management of the plaintiff, such undertaking to be given in the manner and form approved by the Master, it was declared that he would be entitled to the benefits given to him by the will; but in case he should refuse to give such undertaking, then it was declared that he was not entitled to them; and it was declared that, in the event of his giving such undertaking, the trustees were entitled to the guardianship, custody, or tuition, and management of the plaintiff during her minority, and in that case the Master was to approve of a proper scheme for the education and bringing up of the plaintiff according to the meaning and intention of the testator, as expressed in his will, regard being had to her rank and expectations in life. Reg. Lib. A. 1818, fol. 1444.

The father entered into a recognizance not to interfere in the education of the infant, as directed by the decree, and the decree made on further directions, ordered the costs of so much of the suit as related to his recognizance to be paid out of his legacy of 2000*l.* Reg. Lib. A. 1820, fol. 889.

This case is noticed in Beames on Costs, p. 390, and in 6 Mad. p. 89.

management of their aunt, and their disapprobation of the suit. The defendants had put in an answer, to which exceptions had been taken and allowed.

Mr Agar and Mr Duckworth, in support of the motion, contended that when the suit appeared not to be for the benefit of the infants, the court had been in the habit of stopping it on motion, and they referred to Da Costa *v.* Da Costa, 3 P. W. 140.

Mr Hart, Mr Wetherell, and Mr Spence, on the other side.

The Lord Chancellor. I doubt whether, if the bill be proper in its contents, you can come here by motion to stay the suit, upon statements of surveyors or accountants that it is not necessary(*a*).

With respect to the rest I shall not give judgment to-day. It is enough to say at present, that when it first came before me upon *habeas corpus*, I must have decided it on the same principles as a common law judge. After hearing so much about religious principles, it is proper for me to say that I cannot act upon those principles, unless they be such as are contrary to the law of the land. The only view in which they are material is, that a father may permit his children to be brought up by other persons of a particular persuasion, so as to make it difficult for the court not to see that the happiness of the children must be affected, if interrupted in their course of education in those principles, and that their father would be the author of that suffering to them.

In the beginning of August the eldest of the infants attained the age of twenty-one, and shortly after married the person alluded to before.

Aug. 28.—The Lord Chancellor(*b*), (after reading the will of Mrs Beatson) proceeded thus:

This is the will of a grandmother providing for her grandchildren by giving them as tenants in common a moiety of certain estates, and by giving to each of them interests in certain other estates, and also by giving to each of them considerable pecuniary legacies, and expressly doing what she might lawfully do, giving to her daughter the management and disposition of the property devised to her grandchildren, and entrusting to her the discretion of providing for their maintenance and education, out of the property, as she should think right. She then goes on, and attempts to do that which she could not lawfully do; namely, the father of her grandchildren being living, she appoints a guardian during their minority. The bill, in which it is sought to have all the proceedings stayed, was filed in the names of the three infants, and it was insisted, though I do not think it necessary to examine into that allegation, that it was a bill which it was not necessary to file. It was said that this lady had so well managed the property, that it could not have been necessary to file a bill for an account of it. It occurred to me to think that whatever might be right to be done as to the custody of the children, yet that it would be too much to say that a father should not be at liberty to file a bill, in order to know what the property was, which had been left to his children, how much had been applied towards their maintenance and education, how much remained for them, and, in short, what was precisely their situation in respect o

(*a*) See Stevens *v.* Stevens, 6 Madd. 97.

(*b*) Ex relatione

the property. It may be that when the answer of the defendants comes in, it may appear that such a cause ought not to be suffered to go on; but the costs being at the risk of the next friend, if it turns out to be a suit that ought not to have been instituted, the question of costs will then be for my consideration. I do not, therefore, think proper to stay the proceedings. If there is any occasion to apply to the court to stop this as a vexatious suit, it will then be time enough to consider the question of costs. It would be premature to do it now.

On the other hand, when it is desired that the children should be removed out of the custody of the aunt, the application is made upon two grounds. It is said that the parental authority of the father binds the court to do so, and that with respect to the young lady who has just come of age, she was by living with her aunt exposed to the addresses of persons who were her inferiors in point of rank in life. With respect to the last point it was but very lately made the ground of complaint. She has since come of age, and was at liberty to judge for herself, and, in fact, has married. This is a circumstance that does appear to me not to leave this as if it was a case of misconduct on the part of the guardian, on account of which the infants ought to be removed.

It is always a delicate thing for the court to interfere against the parental authority; yet we know that the court will do it in cases where the parent is capriciously interfering in what is clearly for their benefit. In the case of Powell *v.* Cleaver the principles on which the court proceeds were fully discussed. In a case of this kind this court would not feel itself at liberty to deliver back the infants to the custody of their father, and for the reasons that I shall notice. It has been stated that he is a dissenting minister: I mention that again, guarding myself against its being supposed that his bearing that character furnishes the least ground why he should not have the care of his children, but it furnishes this observation, that his situation in life leaves him without the means of so educating them as they ought to be educated, regard being had to their fortune and estate. The father objected to the aunt because she married: she objected to delivering over the children to their father because their mother died, and the father had taken another wife; but the circumstance that decides me about not removing the children is this, that although the testatrix could not impose the terms of appointing a guardian where the father was living, yet the father by his consent might enable the guardian to act, and by his consent it appears that he has enabled the guardian to act, and by such consent these children have, with very little interruption, continued under the care and guardianship of the aunt. All their habits have been acquired under the roof of their aunt; all their connexions have been formed under their aunt; and it appears to me that the father has so far given his consent to this course of education as to preclude him from saying that he shall now be permitted to break in and introduce a new system of education, which cannot be consistent with the system to which they have been habituated, and where so much depends upon the quantum of supply for the purpose which the discretion of this lady may lead her to apply, if the testatrix has left her the discretion of regulating the means for their education.

It, therefore, does appear to me that the testatrix, by the benefits she has given these children out of her property, has purchased the power of educating them in the way and under the control and guardianship which she has pointed out, and the parent has consented to; and I cannot help

thinking that unless this gentleman can bring before the court some complaint on the ground of improper conduct, he must be taken to have given his consent to the course of education which has been pursued. I have not, in my judgment, a case before me that can justify me in removing these children from the custody in which they are, or from the course of education in which they have been placed and have hitherto gone on. That opinion of mine does not preclude any just complaint, if there is a just cause of complaint, but under the present circumstances I do not think I can grant this application(*a*).

(*a*) In the case alluded to, ante p. 120, note, the mother of the infants was possessed of a considerable property, settled to her separate use; the mother and father were living separate, and the income of the latter was small. A petition presented by the mother in the name of herself and the infants, prayed that they might be placed with her, or that it might be referred to the Master to approve of a plan for their education, and to appoint a proper person to have the care of them, the mother offering to provide for their maintenance out of her separate income; it also prayed that the father might be restrained from taking them out of the jurisdiction. It was urged, as one of the grounds in support of the petition, that the father's income was not sufficient to enable him to give the infants an education suitable to their situation in life and to their expectations, and that it would therefore be for their benefit that their mother's proposal should be acceded to. On this part of the case the Lord Chancellor said, that there were cases where, without any provision antecedently made, the court would remove a child from the parent; and alluded to a case where the father professed himself an atheist(1), and to cases in which the court had formerly interfered against Roman Catholic guardians or parents(2), observing that, as to the latter point, the law was now changed. But wherever the court had interfered against the father upon pecuniary considerations, they had been solid considerations, not merely expectations. In all the cases which his lordship remembered, there had been some immediate irrevocable provision, by which the child could be brought up in a manner suitable to its future property. The court had there said, that it would not permit the father wantonly and capriciously to deprive the child of that benefit. As in Powell *v.* Cleaver, where benefits were given to a child, on condition that he should be educated in a particular manner, the father was not allowed to defeat the gift. So in the case of the young lady whom Mr Geo. Selwyn provided for(3). But the court would not interfere upon a mere offer. His lordship refused the application, but added, that his decision was without prejudice to any other application or proposal which might be made, in case of any permanent provision being made for the infants. As to the father taking them abroad, there was no difficulty about that; as they were wards of the court, he must be restrained from doing that. And he had no difficulty in saying, that, as they were wards of the court, and therefore under its protection, and recollecting that children ought to be brought up in dutiful obedience and warm affection towards both parents, he would not allow the father to take them so out of access as not to have opportunities of nourishing those feelings. If any complaint was made of want of access, that might be remedied.

The father being some time afterwards appointed to a situation in his majesty's service, which required him to reside abroad for several years, petitioned for leave to take the infants with him. He stated that he was desirous of being reconciled to his wife, and it appeared that he had with that view made some overtures to her, which she had declined. The matter was several times mentioned before the Lord Chancellor, and his lordship ultimately ordered that the father should be at liberty to take the infants abroad with him, undertaking to bring them, or such of them as should be living, back with him; and he was half-yearly to transmit, properly vouched, to be laid before the court, the plan of tuition and education for each of the infants, actually adopted and in practice at the time of such half-yearly returns, specifying particularly where and with whom they resided(4).

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(1) Shelley *v.* Westbrooke, post.

(2) Teynham *v.* Lennard, 2 Bro. C. C. 510. 4 Bro. P. C. 302, Edition *Toml.*

(3) Fagnani *v.* Selwyn, post.

(4) See Mountstuart *v.* Mountstuart, 6 Ves. 363.

[Lyons *v.* Blenkin.]

Shelley *v.* Westbrooke.

A father's authority over his children controlled on the ground of his professing and acting on irreligious and immoral principles(1).

A petition was presented in the name of the infant plaintiffs, stating the marriage of their father and mother in the year 1811, and that they were the only issue of it; that about three years ago the father deserted his wife, and had since unlawfully cohabited with another woman; that thereupon the mother returned to the house of her father with the eldest of the infants, and the other was soon after born; that they had since that time been maintained by their mother and her father, and that their mother had lately died. It was then stated that the father avowed himself an atheist, and that since his marriage he had written and published a work, in which he blasphemously derided the truth of the Christian revelation, and denied the existence of a God as creator of the universe; and that since the death of his wife, he had demanded that the children should be delivered up to him, and that he intended, if he could, to get possession of their persons, and educate them as he thought proper. Their maternal grandfather had lately transferred 2000*l.* 4 per cents into the names of trustees, upon trust for them on their attaining twenty-one, or marrying with his consent; and in the mean time to apply the dividends for their maintenance and education.

The Lord Chancellor gave his judgment in writing. The editor has been favoured with the following copy by Mr Shadwell, who was counsel in support of the petition:

"I have read all the papers left with me, and all the cases cited.

"With respect to the question of jurisdiction, it is unnecessary for me to add to what I have already stated. After the example of lord Thurlow, in Orby Hunter's case, I shall act upon the notion that this court has such jurisdiction, until the house of lords shall decide that my predecessors have been unwarranted in the exercise of it.

"I have carefully looked through the answer of the defendant, to see whether it affects the representation made in the affidavits filed in support of the petition and in the exhibits referred to, of the principles and conduct in life of the father in this case. I do not perceive that the answer does affect that representation, and no affidavits are filed against the petition.

"Upon the case, as represented in the affidavits, the exhibits, and the answer, I have formed my opinion, conceiving myself according to the practice of the court, at liberty so to form it in the case of an infant, whether the petition in its allegations and suggestions has or has not accurately presented that case to the court, and having intimated in the course of the hearing before me that I should so form my judgment.

"There is nothing in evidence before me sufficient to authorize me in thinking that this gentleman has changed, before he arrived at the age of twenty-five, the principles he avowed at nineteen. I think there is ample evidence in the papers and in conduct, that no such change has taken place.

"I shall studiously forbear in this case, because it is unnecessary, to state in judgment, what this court might or might not be authorized to do in the due exercise of its jurisdiction, upon the ground of the probable effect of a father's principles of any nature whatever upon the education of his children, where such principles have not yet been called into activity or manifested in such conduct in life, as this court, upon such an occasion as the present, would be bound to attend to.

"I may add, that this case differs also, unless I misunderstand it, from any case in which such principles having been called into activity, nevertheless, in the probable range and extent of their operation, did not put to hazard the happiness and welfare of those whose interests are entrusted to the protection of this court.

"This is a case in which, as the matter appears to me, the father's principles cannot be misunderstood, in which his conduct, which I cannot but consider as highly immoral, has been established in proof, and established as the effect of those principles: conduct nevertheless, which he represents to himself and others, not as conduct to be considered as immoral, but to be recommended and observed in practice, and as worthy of approbation.

"I consider this, therefore, as a case in which the father has demonstrated that he must, and does deem it to be matter of duty which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider immoral and vicious—conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community.

(1) Wellesley *v.* The Duke of Beaufort, 2 Russ. Rep. 1.

"I cannot, therefore, think that I should be justified in delivering over these children for their education exclusively, to what is called the care to which Mr S. wishes it to be entrusted.

"If I am wrong in the judgment which I have formed in this painful case, I have the consolation to recollect that my judgment is not final.

"Much has been said upon the fact that these children are of tender years. I have already explained, in the course of the hearing, the grounds upon which I think that circumstance not so material as to require me to pronounce no order.

"I add, that the attention which I have been called upon to give to the consideration, how far the pecuniary interests of these children may be affected, has not been called for in vain. I should deeply regret if any act of mine materially affects those interests. But to such interests I cannot sacrifice what I deem to be interests of greater value and higher importance.

"In what degree and to what extent the court will interfere in this case against parental authority, cannot be finally determined till after the Master's report.

"In the mean time I pronounce the following order."

The order restrained the father and his agents from taking possession of the persons of the infants, or intermeddling with them till further order; and it was referred to the Master to inquire what would be a proper plan for the maintenance and education of the infants; and also to inquire with whom, and under whose care the infants should remain during their minority, or until further order. 17th March 1817. Reg. Lib. B. 1816, fol. 723.

Courtois *v.* Vincent.

The mother of natural children being alive, another person appointed guardian, with directions for intercourse between the infants and their mother.

The infants were the natural daughters of the testator, who had bequeathed them considerable fortunes. The Master had, pursuant to a former order, approved of a guardian for them, and allowance for their maintenance. Their mother, who was desirous that they should be permitted to reside with her, presented a petition, objecting to the Master's report, and praying that it might be reviewed. The Lord Chancellor confirmed the appointment of the guardian, but directed the Master to consider what intercourse between the infants and the mother could be reasonably provided for in the plan of their maintenance and education under their guardian(1). 18th December 1820. Reg. Lib. A. 1820, fol. 303.

Fagnani *v.* Selwyn.

A settlement being made on an infant (whose father was dead) on condition of her being under the care of the settlor, it was referred to the Master, to consider whether he should be appointed guardian, taking the settlement into consideration.

The bill stated that on the 25th of August 1771, the infant plaintiff's father and mother, then of Milan, being resident in England, the plaintiff's mother was delivered of the plaintiff at a house in Dover street; that the plaintiff's mother, in a few days after the birth of the plaintiff, returned to Milan, and left her under the care of a nobleman in this country, under whose care she continued till the year 1777, and from that time until the spring of the year 1779, the plaintiff resided at Milan and at Paris, and was, during part of that time, with her father and mother, and part of that time under the care of the defendant, George Augustus Selwyn; that in the spring of 1779 her father and mother delivered her to the sole care and protection of, and to be maintained and educated by the said G. A. S., and that they had not since contributed to her support, and had not since been in England, but had resided at Milan till 1785, when the father died; that the mother still continued to reside there; and that the said G. A. S. had had the care and protection of her, and had constantly showed kindness to her. He had transferred 10,000*l.* 4 per cent annuities to trustees, which, by deed dated the 8th February 1788, was settled upon trust for himself for life, and after his death upon trust for the plaintiff, to be transferred to her on attaining twenty-one, or marrying with the consent of the trustees; and after his

(1) See Rex *v.* Soper, 5 T. R. 278. Rex *v.* Hopkins, 7 East, 579. Strangeways *v.* Robinson, 4 Taunt. 498.

[Lyons *v.* Blenkin.]

death the interest was to be applied for her maintenance and education until she should attain the age of twenty-one years, or marry with such consent as aforesaid. It was provided, that in case the plaintiff should, in the lifetime of the said G. A. S., attain the age of twenty-one, or marry with his consent, the plaintiff's interest in the fund was to become vested and be transmissible to her representatives, although the transfer was to be postponed until after his death: it was also provided, that in case the plaintiff should marry under the age of twenty-one years in the lifetime of the said G. A S. without his consent, or should, after his death, marry under that age without the consent of the trustees, or in case the plaintiff should happen to die under the age of twenty-one years without having been married with such consent as aforesaid, or in case the plaintiff should, at any time before she should attain twenty-one years of age, cease to continue under the care of the defendant G. A. S., or of such other person as he should from time to time approve, or in case of his death, if the plaintiff should not continue under the care of such person or persons as should from time to time be approved by the trustees until she should attain twenty-one, then and in any of the said cases the trustees were immediately to transfer the fund to the defendant, G. A. S., for his own use and benefit. The bill then stated the plaintiff's father being dead, and no person being properly authorized to take care of her person during her minority, she was desirous of securing to herself more effectually the benefit of the provision so made for her, by the appointment of the defendant G. A. S. to be guardian of her person, and having the protection of the court for her continuance under the care of the said defendant, or of such person as he should appoint during her minority, and of the trustees after his death, according to the terms of the deed. It prayed that the defendant G. A. S. might be appointed the guardian of the plaintiff's person during her minority, and that proper directions might be given for securing to the plaintiff the benefit of the trust deed, by providing for the accomplishment of the condition therein contained, and upon which the trusts were to continue in force, and that the fund might be secured. The defendants were G. A. Selwyn and the trustees. Their answers admitted the matters stated in the bill. The cause was heard at the Rolls on the 27th of February 1788, and a decree was made, directing that the 10,000*l.* 4 per cent annuities should be transferred into the name of the accountant-general; and it was referred to the Master, to consider whether it would be proper to appoint the defendant G. A. S. to be guardian to the plaintiff, taking into consideration the effect of the said deed of trust. Reg. Lib. A. 1787, fo. 283.

Ex parte Rawson. Ex parte Lloyd.

Jacob, 274.

Where part of the account between two mercantile houses which became bankrupt, consists of bills that may be proved against both estates, there can be no proof in respect of those bills as between the two houses, unless there is a surplus after satisfying the holders of the bills.

Sept. 1, 1821.

PREVIOUSLY to and during the year 1810, Messrs Hodson and Quarrell, of Radcliffe in Lancashire, calico printers, were in the habit of consigning goods to be sold on their account, to Messrs Winstanley and Hudson, of London, Manchester warehousemen. They drew bills of exchange on Winstanley and Hudson, who also occasionally made them remittances in cash, and sometimes received from them in return the acceptances of other persons.

On the 30th of May 1810, an agreement was drawn up, regulating the terms on which business was to be carried on between the two houses; Hodson and Quarrell were to consign to Winstanley and Hudson, for sale on commission, printed cotton goods to the amount of 40,000*l.* annually: three per cent commission was to be allowed upon the sales. Hodson and Quarrell were to be at liberty to draw bills at three months for the value of the goods consigned, after deducting ten per cent, which Winstanley

and Hudson were to accept and pay. Hodson and Quarrell were to keep Winstanley and Hudson from being in cash advance, and were from time to time to give them bills to the amount required, accepted by houses to be approved by them, and not at longer dates than three months, and Hodson and Quarrell were to be at liberty to draw for the amount of such bills at the same date.

About the 20th of July 1810, both houses stopped payment, and a few months after commissions of bankrupt issued against them. At the time of their stopping payment, the amount of bills drawn by Hodson and Quarrell, and accepted by Winstanley and Hudson outstanding, and which were dishonoured, was 35,930*l.* It also appeared that a number of bills accepted by other persons had been remitted by Hodson and Quarrell to Winstanley and Hudson, and had been negotiated by them for valuable consideration; of these, bills to the amount of 26,157*l.* 10*s.* had afterwards been dishonoured. Winstanley and Hudson had in their possession goods consigned to them by Hodson and Quarrell to the amount, according to the invoice prices, of 12,626*l.* There were also some debts outstanding, due for goods belonging to Hodson and Quarrell, sold by them; these the assignees of Winstanley and Hudson received to the amount of 557*l.*

The assignees of Hodson and Quarrell proved under the other commission a debt of 165*l.* 5*s.* as the balance of the account between the two houses; this balance was computed upon the principle of rejecting from each side the dishonoured bills. They now presented a petition praying that the assignees of Winstanley and Hudson might pay over to them the 557*l.* which they had received, and might also account for the value of the goods in their possession at the time of the bankruptcy, which they had since sold.

The petition stated that the bills accepted by Winstanley and Hudson were drawn, as well on account of the goods consigned, as of a bill and cash account subsisting between the parties; and that the acceptance of these bills, and the remittance of other bills by Hodson and Quarrell was a mutual accommodation to both houses. The bills received by Winstanley and Hudson from Hodson and Quarrell had been paid away by them for valuable consideration, and the respective holders had proved or might prove them under both commissions. The acceptances of Winstanley and Hudson had in the same way been paid away by Hodson and Quarrell to persons who had proved or might prove them under both commissions.

A counter-petition was presented by the assignees of Winstanley and Hudson, to expunge the proof of the 165*l.* 5*s.*, and praying a general account of all the dealings between the two houses, including the several bills outstanding and dishonoured. Their petition insisted that no accommodation bills or cross-paper had ever been given or exchanged between the parties, but that their dealings had always been upon the footing of the agreement of May 1810, and that there had never been more than one account between them. They stated that it often happened that the acceptances of Winstanley and Hudson fell due before the goods on account of which they had been drawn were sold, but as they were not to be in cash advance, Hodson and Quarrell remitted bills on other houses to them, at the same time drawing on them at two or three months for the amount. They believed that the dividends which their estate would pay upon the sum of 26,157*l.*, the amount of the bills remitted to them by Hodson and

[Ex parte Rawson.]

Quarrell and dishonoured, would exceed what the estate of the latter would pay upon the 35,930*l.* the amount of the acceptances given to them by Winstanley and Hudson. They contended that, according to the usual course of dealing between principals and factors, and the understanding between these parties, they had a lien on the goods and effects in their hands for the general balance of account, and were, therefore entitled to retain them.

It appeared that all the dealings between the two houses were entered in one account, which was occasionally balanced; the bills were reckoned as cash, deducting the discount for the time they had to run. The last settlement was on the 31st of May 1810, when the balance was computed to be 1320*l.* 9*s.* in favour of Winstanley and Hudson. The amount of the goods consigned in the course of the year 1810 was about 18,000*l.*; the acceptances given by Winstanley and Hudson amounted to about 67,121*l.* 12*s.*

The case was twice argued in the course of the year 1813, by Mr Richards and Mr Agar, for the assignees of Hodson and Quarrell, and by sir Samuel Romilly, Mr Leach and Mr Cullen, on the other side. It was re-argued by Mr Agar and Mr Cullen, in May in this year. The cases of Ex parte Walker, 4 Ves. 373, and Ex parte Earl, 5 Ves. 833, were referred to.

Sept. 1.—The Lord Chancellor (after stating the circumstances, in the course of which he observed that the amount of the bills showed that they could not have been accepted merely on the credit of the goods). I think I argued that case of Ex parte Walker, and I must say that the speculations about paper certainly outran the grasp of the writs of courts of justice. When I first came into Westminster Hall, there was no such thing as an acceptor saying that he had no effects: his acceptance was an acknowledgement that he had. That, however, was overruled, and it was decided that when the acceptor had no effects, it was necessary to give notice; for before it was the constant rule to give notice, even if the acceptor was a bankrupt, and, therefore, every one knew that he could not pay a farthing.

This new sort of circulating medium puzzled as able a man as ever sat here, lord Thurlow. I remember the first case of it. It was then small in amount, one bill and another. He then considered the acceptance of the one as a consideration for the other, and allowed both to prove, but then there was this difficulty, that it lessened the fund for paying the holder of the bill, and thus by proving, they prejudiced their own creditors. It was found this would not do, and then it was said, if you will prove, you must first take up your acceptance, which got rid of the objection of the party proving in competition with his own creditor(*a*).

Then came the case of those houses at Liverpool and Manchester drawing on one another to the amount of 500,000*l.* What was to be done then? The courts were puzzled and distressed. At last, however, we came to a sort of anchorage in that case, Ex parte Walker; I have no difficulty in saying that I never understood it. I am satisfied that though, no doubt, the court understood that judgment, yet none of the counsel did.

The decision was this, that where there are cross bills drawn for accommodation, they are all to be thrown out of the account on both sides, and

(*a*) See Cooke's Bank. Law, p. 157, et seq.

it is to be taken as if it were a cash account only. If this were upon the principle that applies to one or two bills, that they are not to be proved by one estate against the other, till all the creditors of both are paid, I could understand it. If there be 1000*l.* of acceptances on the one side, and 10,000*l.* on the other, lord Loughborough says, that they are not to be regarded at all, that it is all chance how the two estates may pay. I say, not; and if there be surplus of one estate to satisfy the other, why should it not be applied? Look at the case of partnership; a partner cannot prove against the estate of his co-partner, so as to affect the creditors of both, but he may be paid his demand out of the surplus, if there is any. I do not see why the same rule is not to be applied here.

But there is a question of fact, whether there were one or two accounts. Upon reading the papers it appears to me that if lord Loughborough's decision be right, it does not make a great deal of difference in the effect, whether there be a bill account and a cash account, or whether there is only one. Still, if so much of it as consists of bills, consists of bills that may be proved against both estates, how is it possible, till the creditors proving them are satisfied, that one estate can make any proof against the other, with reference to those bills? How can they be allowed to come in competition with their own creditors? The utmost, therefore, would be to reserve the consideration of it, in the event of there being a surplus.

There is a peculiarity distinguishing this from all other cases of cross paper; that the parties stood in the relation of principal and factor, which gives rise to the question, if all the dishonoured bills are to be struck out, if that be law according to Ex parte Walker, whether it follows that the assignees of Hodson and Quarrell have a right to bring the goods into the account, or whether the factors have a lien on the goods, giving them a right to draw into their estate the proceeds of them, to indemnify them against the balance of the general account. That is a question which has not been determined in bankruptcy, and I will not determine it. I am disposed to think the commissioners right in rejecting the bills, supposing that the creditors proving under them have not been paid, which is not very likely. Whether the goods are liable to the lien, and whether the 557*l.* was received to the use of the assignees of Hodson and Quarrell, is a question of law which may be tried in an action; and I think it will be more fairly tried when the jury are informed of the nature of the proof. The assignees of Winstanley and Hudson must admit the fact of receiving them, and the statute of limitations must not be set up. If the value of the goods cannot be settled, it must be left to be found by the jury.

I cannot bring myself to think that the case of Ex parte Walker is right, in the event of there being a surplus(*a*).

Stilwell *v.* Wilkins.

Jacob, 280.

On a bill to set aside a purchase, the answer of the defendants, the devisees of the purchaser, admitting great inadequacy of price, and stating their ignorance as to other circumstances of fraud alleged, a receiver appointed.

(*a*) See Ex parte Read, 1 Glyn & Jameson, 224.

[Stilwell *v.* Wilkins.]

There may be cases of inadequacy of price so great as to form a ground for cancelling a contract. Sept. 4, 1821.

THIS was a bill filed for the purpose of setting aside a purchase under the following circumstances:

Under the will of J. Sorne, certain estates stood limited after the death of Elizabeth, the wife of Josias Collier, to the youngest son of the testator's grand-niece, Mary Stilwell, in fee. Upon the death of Elizabeth Collier, in December 1803, John, the youngest son of Mary Stilwell, became entitled: he had then lately attained the age of twenty-one years, and was serving as a common sailor on board of a ship of war. In July 1805, he sold and conveyed the estates to Josias Collier: the consideration for the purchase was a sum of 250*l.* and an annuity of 52*l.* 10*s.* per annum, to be paid to him by weekly payments, for his life. The estates were of considerable value; it was admitted by the answer that, at the death of Collier, in the year 1809, the rental amounted to 189*l.* 10*s.*, exclusive of a part of the property which had been sold by Collier in his life-time. The same solicitor was employed in the purchase for Collier and Stilwell: the latter afterwards went to sea again, being as the bill alleged, apprehended as a deserter, and died intestate in the year 1809, on board one of his majesty's ships: the plaintiff, Thomas Stilwell, was his heir at law. Collier died in December 1809, having devised the estates to two of the defendants, and appointed the two other defendants his executors. The bill was filed in 1816.

Besides these facts, the bill stated various other circumstances tending to affect the transaction with fraud; it was alleged that John Stilwell was a person very ignorant and inexperienced, of weak intellects, and in constant habits of intoxication; that he confided the management of the property to Collier, who had previously been in possession in right of his wife, and who kept him in the dark as to its real value; that he was much distressed for want of money; and that he was persuaded to execute the deeds under the idea that they conveyed the estates for his life only, and would save him the trouble of managing them. The defendants by their answer stated themselves to be ignorant of all these circumstances.

The Vice-Chancellor having, upon the motion of the plaintiff, made an order for the appointment of a receiver(*a*), the defendants now moved to discharge that order.

Mr Hart and Mr Barber, in support of the motion.
Mr Roupell, on the other side.

Sept. 4.—The Lord Chancellor. This was an application to discharge an order of the Vice-Chancellor for the appointment of a receiver. The plaintiff states himself to be the heir at law of a person entitled to some real estates which were purchased by one Collier at the price of 250*l.* and an annuity of fifty guineas per annum, the ordinary current value of an estate of 189*l.* per annum being much more.

When the motion was made, it was represented as bringing before the court the dry question, whether inadequacy of price be sufficient to set aside a sale. It is most certain that in general a sale will not be set aside on that ground; yet there may be cases of inadequacy so enormously great

(*a*) See 6 Mad. 49. Reg. Lib. B. 1820, fol. 1315.

as to form a ground for cancelling the contract. And though this is a hard case, the defendants taking only as devisees, and it being impossible to impute to them any thing that can affect their honour or character, yet it is clear that the purchase was procured from a person who could not possibly judge for himself; the young man was a common sailor, lately come ashore, and much pressed for money, and the purchaser knowing perfectly the value of the property.

The degree of inadequacy is greater than I ever remember; 180*l.* a year purchased for about 600*l.*, taking the annuity at about six or seven years' purchase. And I cannot agree that the inadequacy is the only circumstance to be looked at. The bill charges many other circumstances that may be very material at the hearing.

These circumstances the defendants, in their answer, say that they are ignorant of, but they do not go the length of saying that they disbelieve them. They have not stated any belief on the subject, which indeed they could not form, for it does not appear that they ever sought for information as to these circumstances, which are so extremely important, especially when connected with the gross inadequacy of price.

The point that struck me was, whether on a bill to impeach a sale for fraud, the court interposes so strongly before the hearing as to take away the possession from persons holding it under the effect of deeds not yet set aside by a decree of the court; and I put it to Mr Roupell to tell me whether he could find any such case. I tried also to ascertain whether the money paid as the price had been satisfied by receipt of the rents and profits; for if not, the defendants would be entitled to hold as incumbrancers for so much as had not been received back by perception of the rents and profits. But that circumstance fails, for I find that the whole must have been satisfied. I am ready to admit, that I do not remember any instance of a receiver being so appointed, but still the question is, whether there may not be a case where it ought to be done. If the case stated be true, and it is more than probable that it is true, the inadequacy was so monstrous, the situation of the young man, and the state of his intellect were such, that it is hardly possible to suppose that the transaction can stand; and I think, therefore, that this is a case where such an order may be made, though it is not the general habit of the court.

Brown *v.* De Tastet.

Jacob, 284.

On the death of one partner, the survivor retaining his capital and employing it in the trade, decreed to account for the profits derived from it, making him proper allowances for the management of the business.

A., B., and C. being partners together, A. agrees with D. to give him a moiety of his share in the concern; an account may be decreed between A. and D. without making B. and C. parties.

An order inconsistent with the original decree cannot be made upon exceptions to the report.

Nov. 8, 9, 12, 1819; Jan. 17, 18, Feb. 27, May 19, 22, Sept. 5, 1821.

ANTHONY MANGIN having for some years carried on business in

[Brown v. De Tastet.]

London as a merchant, and being advanced in years, agreed with the defendant De Tastet, in September 1800, to relinquish his business to him. By the agreement, Mangin's interest in the house was to cease from the 1st of September 1800, and he was to have credit for what should appear due to him on the settlement of the accounts, and was to be at liberty to withdraw one-fourth of it immediately; another fourth in September 1801; and the rest in the course of the year 1802, with the exception of about 3000*l.* or 4000*l.* which he was to leave in the house for eighteen months longer: the concern was to be carried on for four years under the firm of Anthony Mangin, and his retirement was not to be announced. De Tastet about the same time admitted M. A. De Paiva and Frederick Grellet into partnership with him in the business; they were each to have a one-fourth share. De Tastet was engaged in another mercantile house, under the firm of Firmin De Tastet and Co.; and the affairs of the house of Anthony Mangin were chiefly managed by De Paiva and Grellet.

In the course of the year 1802, Mangin became desirous of again entering into the business, and De Tastet, at his request, agreed to let him have one-half of his (De Tastet's) moiety of the partnership for his life, to commence from September 1800, the time when he retired. This agreement between De Tastet and Mangin was partly contained in a letter written by the latter to the former, agreeing to take a fourth share, and to run the risk of the business in halves with him; there was no other written memorandum relating to it.

In July 1803, Mangin died intestate, leaving one daughter, who, with her husband, was the plaintiff in this suit. At the time of Mangin's death a considerable part of his property was embarked in the house as his share of capital, of which De Tastet and his partners possessed themselves, and continued to employ it, together with their own property, in their trade. Grellet retired from the partnership in 1807, and De Paiva in 1808, leaving De Tastet the sole proprietor of the house: on their retirement, one of them received from him 5000*l.* and the other 6000*l.*, subject to the taking of the accounts.

The plaintiff, who had taken out administration to Mangin, filed the bill in June 1809, against De Tastet, praying an account of Mangin's property in the partnership, and of the profit or interest made with it since his death; alleging, as the cause of the delay, that she had been put off from time to time by various excuses. De Tastet, in his answer, admitting the circumstances as stated above, and that he had in his hands a balance of 1571*l.* due to Mangin's estate, stated, as a reason for not having sooner accounted with the plaintiff, that her legitimacy was questioned by some relations of Mangin, who claimed to be his next of kin, and had opposed her application for letters of administration in the ecclesiastical court; and he submitted that Grellet and De Paiva were necessary parties. The bill was then amended by adding them as defendants, and also the persons who claimed to be next of kin to Mangin. Grellet was out of the jurisdiction. De Paiva, by his answer, stated his ignorance of the agreement in 1802, by which Mangin was re-admitted into the business: it was a contract between Mangin and De Tastet only, and he therefore contended that he was not accountable to the former or his representatives. The question of the plaintiff's legitimacy was determined in her favour, by an issue directed in July 1811, to try the fact. The balance admitted by De Tastet was paid into court in January 1810.

The cause was heard before the Master of the Rolls on the 6th of March

1812, when a decree was made for an account of the dealings and transactions between the defendant De Tastet and Mangin in his lifetime, and of the property of Mangin which was in the hands of De Tastet, or of him and his partners De Paiva and Grellet at the time of Mangin's death, or which was afterwards possessed by him or them; and also an account of all profits and gains made of or by means of such property by De Tastet, or by him and De Paiva and Grellet; and it was ordered that what, upon the taking of such accounts, should appear to have come to the hands of De Tastet, or of him and De Paiva and Grellet, and to be the amount of the profits and gains so made of or by means of Mangin's property, should be answered by De Tastet. The bill was dismissed as against De Paiva with costs, to be paid by the plaintiff, and repaid by De Tastet. From this decree the defendant De Tastet shortly after appealed.

Pending the appeal, the accounts proceeded in the Master's office. The Master, by his report made in May 1817, after stating that Mangin was at the time of his death a partner with De Tastet in the business of a merchant, carried on by them and De Paiva and Grellet, under the firm of A. Mangin, found a balance of 17,532*l.* due to Mangin from the concern at that time, which sum continued to be employed in it, as well as certain other sums of money belonging to Mangin subsequently got in; he found that the property of Mangin formed a considerable part of the capital employed in the trade up to December 1807, and from that time till December 1810, exceeded the whole amount of the capital employed: in December 1810, the trade was discontinued. He had given Mangin credit for a share of the profits of the business in proportion to his share of the capital employed in it down to December 1807, and for the whole of the profits from that time to December 1810, and found a balance of 62,604*l.* due from De Tastet. The account had not been carried beyond 1810, and had not extended to profit or interest beyond that made in the business.

The defendant De Tastet took exceptions to the report, which were amended by order, and were, first, that the property of Mangin only formed a part of the capital employed in the trade, and that a considerable part of that capital consisted of the moneys of De Tastet; secondly, that in taking the account of profits, the Master ought to have ascertained what profit was actually made by means of the property of Mangin, or that he ought to have followed the original agreement, according to which, if the whole of the moneys employed in the business were to be considered as the property of Mangin, the clear gains arising from it could only be considered as one-fourth of the proceeds, the remaining three-fourths being to be allowed to the other partners for the assistance afforded by them to the business; thirdly, that the balance amounted only to 8089*l.*

It appeared that the Master had taken the account upon the principle of adding to Mangin's capital his share of profits in each year; the amount thus constituted was taken as his capital in the next year, and a proportionate share of the profits was assigned him. It was insisted, on the part of De Tastet, that great part of Mangin's property had been employed, not in the business, but in discounting bills of exchange; and that a considerable portion of the profits was attributable to his own personal influence and connections, and to the exertions of himself and his partners.

The exceptions were argued before his honour the Vice-Chancellor, who, upon hearing them, made an order dated the 22d of July 1818, referring it to the Master to review the report, and to inquire whether the concerns of the firm, as they stood at the death of Mangin, were in any

manner and how kept separate and distinct from the concerns of the firm that was carried on after his death, and whether the concerns of the new firm were in any manner, and how and to what extent aided or supplied from the concerns of the old firm; and it was declared that the shares of profits which after the death of Mangin were paid by De Tastet to the junior partners of the concern were to be considered as in the nature of wages, and to be allowed to De Tastet in discharge of the account of the profits of the concern; and the Master was to inquire what would be a reasonable compensation to De Tastet for his personal attention and credit, which was also to be allowed to him. From this order the plaintiff appealed.

The appeal against the decree came on to be heard before the Lord Chancellor, on the 8th, 9th, and 12th of November 1819, when his lordship desired, that the appeal against the Vice-Chancellor's order should also be brought on; the argument on both appeals was renewed on the 17th of January 1821, and several subsequent days.

The Attorney-General, Mr Horne, Mr Winthrop, and Mr Palmer for the plaintiff, in support of the decree, argued, that upon the principles laid down in Crawshay *v.* Collins, 15 Ves. 218, the defendant was accountable for the profits he had made, by unjustly detaining the property of his deceased partner, and employing it in his trade. The defendant cannot allege the difficulties of taking the account as a reason for his withholding the profits; those difficulties having been occasioned by his own conduct, in blending together the produce of the capital of another with that of his own capital and his own labour.

The defendant De Tastet is made responsible for his partners as well as for himself, on account of the peculiar nature of the connection between these parties. When Mangin, in 1802, returned to the business, the agreement that he made was with De Tastet only, and not with De Paiva or Grellet. He agreed to take a half of De Tastet's moiety, not a fourth share of the concern; thus, there was a partnership between De Paiva, Grellet, and De Tastet, and a sub-contract between the latter and Mangin. There being no privity of contract between Mangin and the two other partners, he could not call upon them for an account; the bill was consequently dismissed against De Paiva, his answer not admitting any thing to entitle us to a decree against him. The agreement of Mangin being with De Tastet only, gives us a right to look to him only for reimbursement(*a*).

Upon the appeal from the order made by the Vice-Chancellor, they observed, that it aimed at establishing a principle different from that of the decree. The Master being directed to inquire what profits were made by the capital of Mangin, proceeded to estimate the profits of each year, and assigned to Mangin a share of them, proportionate to his share of the capital employed. He then said, that that share of profit ought have been paid over or set apart, instead of which it was continued in the trade, and became, therefore, part of the capital employed in the concern in the next year, and, consequently, in the next year he has credit for a share of profits in proportion to his increased capital, and so on for each successive year. Now, according to the Vice-Chancellor's order, a fourth of the profits is to be allowed to Grellet and De Paiva, and a share also to De Tastet; if the allowance to De Tastet be the same as to the others, one fourth only remains for Mangin; and at all events he must have less than

(*a*) See Bray *v.* Fromont, 6 Madd. 5.

an half, however large his capital may have been. The order gives them the same as if the partnership was still subsisting; whereas, according to Crawshay *v.* Collins, it is considered to be dissolved, and the right to the profits is looked upon as resulting from the employment of capital, and not from the partnership contract. If any compensation for their services was to be made, it might have been claimed as a just allowance.

Mr Hart and Mr Wakefield, for the defendant De Paiva.

Mr Wetherell, Mr Heald, and Mr Pepys for the defendant De Tastet, in support of the appeal from the decree, contended, that it was not justified by the case of Crawshay *v.* Collins. In that case inquiries were first directed as to the nature of the property, and the mode in which it had been employed, with the view of ascertaining how far the principles there stated could be applied. Here there is no inquiry, and no declaration of the principle on which the decree is founded. It must be observed, that in Crawshay *v.* Collins the capital consisted in a great measure of houses, utensils and goods; it was the case of a joint possession of specific chattels. But the business of a commission merchant is different; the retiring partner could claim only a money balance upon the settlement of their accounts; it was a mere debt; there was nothing specific. It may, perhaps, be possible to follow a stock consisting of specific articles; but upon what rule is the calculation of the profits arising from money to be made? The defendant carried on this trade, and he owed a sum of money to Mangin; but it is not, therefore, to be assumed that it was in this trade that Mangin's money was employed. It was mixed up with the general property of the defendant, some of which was engaged in this, and some in other concerns, at different rates of profit, some in discounting bills at five per cent only. And is it to be said that the balance due to Mangin was employed in this particular concern rather than the others, only because this was the most lucrative? It was upon these grounds that, in the case of Crawshay *v.* Collins, your lordship, after a report had been made, required it to be reviewed, that the Master might distinguish between the capital and the stock in trade, conceiving that they must be differently treated, with respect to the question of the account of profits(*a*).

This decree furnishes no rule by which the Master is to ascertain what proportion of the profits was derived from the capital of Mangin; it is clear that it cannot be, as the Master has supposed, in proportion to the amount of the capital employed, for profits depend not upon capital alone, but upon labour, attention, skill, and knowledge of the business, influence, and connexion. The proportion of profits referable to capital, and to the personal services of the partners, depends on the nature of the business; but how is the division to be made? These are difficulties that should weigh with the court before an account is directed, for taking which no satisfactory mode is known. Cases of the greatest hardship have occurred, flowing from the doctrine supposed to be established by Crawshay *v.* Collins. It is supposed that if the representatives of a deceased partner can establish a balance of the smallest amount against the survivor, they are entitled to a participation in the profits, and as a consequence, to an inspection of the books, and an account of all the concerns of the partnership. An immediate settlement is often impossible; and where there are outstanding transactions, the surviving partner cannot at once ascertain whether the balance

(*a*) 1 Jac. & Walk. 267.

is in his favour or against him; and he is left in doubt whether he is carrying on the trade for the benefit of himself, or for that of others, who may start up at a distance of time, expose all his affairs, and involve him in the utmost vexation.

Another objection to the decree is, that it makes De Tastet responsible for his partners, treating him as the only person accountable to Mangin. He must have known that Grellet and De Paiva were jointly interested in the concern; and how can his representatives be allowed to treat it as a firm consisting of himself and De Tastet only? It is, besides, inconsistent with the bill, which states a partnership between the four; and if the plaintiffs found by the answer that they could make a case of separate liability against De Tastet alone, they should have re-amended the bill, to give him an opportunity of meeting it. According to the agreement between De Tastet and Mangin, a part of the property of the latter was to be left in the house for four years, from September 1800; but the account as to the whole is directed to commence from the time of his death.

With respect to the order of the Vice-Chancellor, they contended, that it was not inconsistent with the decree, but explained it, by prescribing the mode in which the account was to be taken; and that it was correct in making allowances for the services of De Tastet and the other partners.

Sept. 5.—The Lord Chancellor (after stating the decree, report, and exceptions, and the order of the 22d of July 1818). This order does not appear to me to decide any thing upon any one point of the exceptions: it only sends the cause back to the Master with certain declarations. When it came before me, it occurred to me to doubt whether it was competent to the court upon exceptions to make an order not quite consistent with the original decree: from the time of the pronunciation of the decree, all the subsequent proceedings should be consistent with it, and if upon the argument of exceptions, it appears that the justice of the case cannot be got at without an alteration of the decree, it must be reheard. I have also entertained doubts which I have not been able to subdue, as to there being any thing to authorize the first inquiry directed; whether the concerns of the firm as they stood at the death of Mangin, were kept distinct from those of the firm continued afterwards. I mean, I doubt whether I could do it upon any thing alleged in the pleadings; for it is certainly an important question, even if there be no foundation for it in the pleadings, whether the court could make a satisfactory decree without having such an inquiry made.

I should have infinite difficulty in affirming the other declaration, that the sums paid to the junior partners should be considered as in the nature of wages; not that it may not turn out to be reasonable, but I apprehend that where the decree directs the Master to make all just allowances to the parties, the regular course of proceeding would have been to crave this deduction from the profits paid to the persons carrying on the business, as a just allowance. If that be done, it may be discussed before the Master, and when his report is made, the court might be called on to decide it, not upon these general exceptions that are not pointed to it, but upon an exception as to that which had been submitted to him as a just allowance. It is not in the ordinary course for the court in matters of this nature, to say in the first instance what is a just allowance. I do not say that it was an improper consideration, what was a just allowance, but this was not the proper mode of getting at it. The same observation applies to the inquiry

as to what will be a reasonable compensation for De Tastet's personal attention. I do not mean to say that the Master should not have made such an allowance, or that the court might not by the original decree have directed his attention to it, but I think it could not be done upon exceptions.

The consideration of the original decree is now regularly before the court, and speaking with great deference and great humility, I own I do not think that I should have made a decree in these terms. The bill aims at an account of the dealings of the partnership, and of the personal estate of Mangin possessed by the defendant, and it seeks for all proper directions to be given with respect to the use made by the defendant and those in partnership with him of the property of Mangin, and considering the peculiar nature of such a bill, it seems to me that the terms of the decree are too loose to point the Master's attention to the matter with the precision and particularity with which such an account ought to be taken.

I should here remark, before proceeding further, that upon reading the bill and the answer of De Tastet, I am satisfied with so much of the decree as considers him to be solely liable not only for his own transactions, but for those of De Paiva and Grellet.

The Master in the execution of the decree has, I am informed, proceeded upon the case of Crawshay *v.* Collins, 15 Ves. 218. In that case three persons, Collins, Noble, and Boughton, carried on the business of pump and engine manufacturers in partnership together. In 1803 a commission of bankrupt issued against Noble, and in 1804 the bill was filed by his assignees, claiming three-eighths of the profits of the business which remained unaccounted for at the time of the bankruptcy, or which had accrued since, and also of two patents, and the profits derived from them. The question, therefore, was, whether the assignees of Noble were entitled to the same relief that he himself would have been entitled to if he had not become a bankrupt: a bankruptcy dissolving a partnership in the same manner as death, in this respect only that assignees have rights somewhat similar to those which the representatives have where the partnership is dissolved by death. It was argued, that in both cases the demand to be made by the representatives of a deceased partner, or the assignees of a bankrupt, was limited to that sum of money which if the account had been taken at the dissolution, would have been found due from the surviving or solvent partner, leaving all the property in their hands. On the other hand it was argued, that in many cases that could not be the law; for instance, if immediately after the bankruptcy, all the stock, which in that case consisted of manufactured goods, pumps, and such things, had been sold for a sum of money, three-eighths of which would have been more than what was due to the bankrupt, taking the account as matter of debt, then the assignees being certainly tenants in common till the stock was converted, and the identical stock being sold, and three-eighths of it yielding more than what was due to the bankrupt at the time of his bankruptcy as the calculated value, what pretence could there be for saying that the assignees should not have a proportion of what it sold for?

But it is asked, will you say that in all cases where there is a partnership, such is to be consequence of carrying on the business, that the profits shall be divisible in the same way as if the partner had not died or had not become bankrupt? I say no; I do not mean to say that it will be so in all cases: but on the other hand, I will not deny that it may be the law in some cases. The general principle, I should say, ought to be this:

that as it is quite competent to the parties to settle the accounts and to mark out the relation between themselves as creditors or debtors, so where there is a non-settlement of the account, (though a settlement may sometimes introduce great hardships and difficulties), yet those who choose to employ the property of another for the purposes of their trade, exposing it to all the risks of insolvency or bankruptcy, have no right to say, that the account shall not be taken, if it can be taken without incurring difficulties which might embarrass the house to such an extent as to make it unjust to demand it.

I had thought that I had always taken great care to lay down nothing that was more than law, and on reading my judgment in Crawshay *v.* Collins, I think it will be found that I have been sufficiently careful not to do it there. [His lordship here read several passages from that case, noticing the caution he had used, and stated that the decree there was for an inquiry as to what profits had been made by means of the stock in trade and capital of the partnership business as the Master should find it to be constituted, adding that it was the simplest of all cases, being nothing but a manufactory of pumps and engines.]

Now I think that decision goes no further than to call on me to consider what decree ought to have been made, under all the circumstances that belonged to De Tastet's possession of Mangin's property, and his applying it to a business which is no further explained in the report, than by being stated to be that of a merchant, which may mean five hundred different things; to consider whether I should have made this decree, or whether it would have been my duty to have directed special inquiries, with a view to the determination of what I could or could not do, on a just application to this case of the principles which, in Crawshay *v.* Collins, appeared to me to be right, with that caution with which they are there laid down. I think some alterations in the original decree will be necessary; I shall not comment minutely on the circumstance that the exceptions have been dealt with in a way as to which I should have entertained considerable doubt, according to my notions of the practice; first, considering that upon exceptions an order should not be made inconsistent with the decree; and, secondly, because it would have struck me, rather to be matter to be infused into the decree, than to be made the subject of an order on exceptions. What I propose to do is, so to alter the original decree as to bring out the case to which the principles that ought to govern as to the profits may be applied; to give such directions as may be necessary for that purpose, and to explain what it may be competent to crave as just allowance. I do not mean to intimate whether the Master should allow wages, as they are called, or compensation, but it cannot be denied, that if the business be such, that on the death of the party other persons are concerned in aiding it by the application of their skill, their services, and their money, a great deal may be included under the head of just allowances, which, till the Master has thoroughly sifted it, the court cannot determine.

The order pronounced upon the appeal from the decree was as follows:

His lordship doth order, that the decree made in this cause, bearing date the 6th day of March 1812, be affirmed generally, but with this qualification, as to the part of it which directs the account of gains and profits, that if the Master, to whom this cause stands transferred, shall find that the late Anthony Mangin, by any written instrument contracted to receive interest, instead of gains and profits, during any particular period,

the Master, in taking the accounts, is to have due regard to such contract, and to state in his report what would be the balance of the account between the parties, if, instead of gains and profits being accounted for during such period, interest only was allowed during such period; and it is ordered, that it be referred to the Master to tax the defendant Manuel De Paiva, his costs of the said appeal, and that such costs, when taxed, be paid to him by the petitioner Firmin De Tastet.

Reg. Lib. A. 1821, fo. 744.

The order pronounced upon the exceptions was as follows:

His lordship doth order, that the order made in this cause, bearing date the 22d day of July 1818, be reversed, save so far as it directs the Master to review the said report, and his lordship doth order that the said order be affirmed, so far as it doth so direct, with liberty for the defendant, Firmin De Tastet, in the proceedings upon such review, to submit to the judgment of the Master any claims as just allowances, which he may be advised ought justly to be made to him, by reason or on account of the management, transacting, and carrying on the business or concern, at any period or periods, by them the said Firmin De Tastet, Manuel De Paiva and Frederick Grellet, or any of them, or by them the said Manuel De Paiva and Frederick Grellet, or either of them, or any other person or persons; and it is ordered, that the said Master do state in his report the facts and reasons upon which he shall have adjudged any allowances to be just allowances, if on the behalf of the plaintiff he shall be requested so to do, and state the facts and reasons upon which he shall have adjudged any allowances prayed not to be just allowances, if he shall be requested on the behalf of the said defendant to make such statements.

Reg. Lib. A. 1821, fo. 759.

The defendant appealed to the house of lords, where the Lord Chancellor's decree was affirmed.

Bricheno *v.* Thorp.

Jacob, 300.

A clerk to a solicitor commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master.

March 31, Sept. 5, 1821.

A MOTION was made on the part of the plaintiffs, that the defendants might be restrained from employing G. G. Day as their solicitor in this suit, or as their attorney or solicitor in any other suit in equity or action at law, commenced or to be commenced in respect of the matters in question in this cause, and to restrain G. G. Day from acting as their solicitor or attorney, and from communicating to them, their counsel, clerks in court, solicitor, attornies, or agents, any information relating to the mat-

ters in dispute in such suits or actions which had come to his knowledge, as clerk to the plaintiff, T. E. Fisher.

The suit was commenced in the year 1816, for the purpose of setting aside a bond entered into by the plaintiff Bricheno, and by the plaintiff Fisher, as his surety, to the defendants, upon allegations of its having been obtained by misrepresentations. Fisher was the solicitor for himself and the plaintiff Bricheno, in the cause. G. G. Day had been his articled clerk from the year 1812 until October 1817, when his articles expired. In the year 1818 he was admitted an attorney, and commenced practice on his own account. He had lately become the solicitor of the defendants in the cause.

It was stated in the affidavits filed on the part of the plaintiffs, that G. G. Day, during his clerkship, had been confidentially acquainted with the circumstances of the suit, that he had been employed to search for cases, and copy affidavits and other proceedings, and had thereby acquired information which would render his being concerned for the defendants highly prejudicial to the plaintiffs; it was intimated that he had been retained for the purpose of taking advantage of a disclosure of the information thus acquired. On the other side this imputation was denied; and it was stated, that Mr Day had been the solicitor of the defendants and of their family in other matters, and that they had employed him in this cause, only from the respectability of his character, and from being dissatisfied with their former solicitor. Mr Day, on his part, denied being in possession of any information which could be injurious to the plaintiffs.

Mr Agar and Mr Parker, in support of the motion, cited Cholmondeley *v.* Clinton, 19 Ves. 261. Coop. Ch. Ca. 80.

Mr Heald on the other side.

March 31.—The Lord Chancellor. The case of Cholmondeley *v.* Clinton was no more than this. A gentleman discharged himself from being solicitor for Lord Clinton, and the question was, whether the court would permit him to turn his back on his client, and to go into the service of the person against whom he had been employed. Here the case stands thus: Mr Day was clerk to a gentleman who was solicitor for the plaintiff in this cause; the time of his service expires: he becomes a solicitor on his own account, and then the defendants employ him.

There may be cases where the mischief which the case of Cholmondeley *v.* Clinton was intended to counteract, may equally occur in the case of a clerk. On the other hand, the cause may be of such a nature, that though the clerk may be retained for the opposite party, it may be impossible for any information he possesses to do any mischief.

But if he is to carry important secrets out of the office, and employ them in the service of others, though I feel that it may operate to the detriment of young gentlemen setting up in business, yet I think that ought not to be permitted. I ought, therefore, to be informed of the nature of the suit, and wish to see the bill and answer. A gentleman going into business for himself must not carry into it the secrets of his master; but, on the other hand, I think it my duty to take care that he may not be prevented from engaging in any business that he may fairly and honourably take.

September 5.—The Lord Chancellor. This is a motion of great

importance. It seeks that the defendants may not be allowed to employ Mr Day, and that he may not be employed as their solicitor in this cause or any other suit relating to the same matters, by reason that he was a clerk in the office of Fisher, one of the plaintiffs, and the solicitor in the cause, and therefore has or may have material information as to the interest of the plaintiffs, and that if he communicates it, or makes use of it against them, he may be doing them an injury which the court ought not to permit him to inflict.

The motion was made upon the supposition that it fell within the precedent established by Cholmondeley *v.* Clinton. But it is certainly not like it in its circumstances. There two gentlemen had been in partnership, and had been the solicitors of lord Clinton in the cause; and it is now known, that in that case at some time or other, the secrets of the title had been communicated to the adversary. One of these gentlemen [I do not mean to intimate that it was he who gave the information] quitted the partnership, and thus voluntarily quitted the employment of lord Clinton.

It was, therefore, his fault, if it was a fault; at all events it was by his own act that he was not employed by lord Clinton, and he then transferred himself to the other side in that cause, in which, no doubt, there was much important information that might be communicated. The application that was made being the first of the kind, I took the opinion of the judges upon it. There could not, I think, be much difficulty about that case. If lord Clinton had discharged the gentleman, and would not continue to employ him, on such a case no opinion was given. But it being by his own act that he ceased to be employed, the judges were of opinion that he could not carry over to the other side the information acquired in the service from which he had discharged himself.

This case is different in specie. The argument goes to this extent; that if a gentleman has been five years a clerk, and in that period happens to have to deal with the causes in which his master is employed, that he cannot afterwards become solicitor for any of the parties against whom his master was employed. It did appear to me that this was going very far, and I thought, that before thus shutting up the sources of employment, it was incumbent on the court to see that there was something more than hypothetical mischief to be guarded against. I have, therefore, read these papers, and though I think it should not be publicly pointed out to me, yet I wish to have it pointed out to me from these papers, in what particular the employment of Mr Day will be prejudicial to the plaintiffs. There are general allegations, but nothing particular is stated; unless that is done, I cannot go the length of making this order. As a general proposition, it would preclude him from being concerned even in a cause in which the master himself might not object to be concerned for both sides.

I know that formerly at the bar, if a counsel was employed, and a retainer was offered him on the other side, he first gave those for whom he had been employed, the option of retaining him, but if they would not, there was no difficulty in going over to the other side, notwithstanding all that he might know. If that be the rule at the bar, we must not lay it down differently for solicitors. I have no conception that we are to give ourselves liberties that we refuse to others.

Mr Agar then mentioned that cases and opinions relating to the suit had

been communicated to Mr Day; but the Lord Chancellor did not consider that of any importance, unless some particular fact was stated(*a*).

Balme *v.* Paver.

Jacob, 305.

A party liable under a bond of indemnity for the costs of another, having, on a compromise, paid what the solicitor stated to be the amount of them, is entitled afterwards to have the bill taxed.

It cannot be made one of the terms of the compromise of a suit that the solicitor's bill shall be paid without taxation. *Semble.*

March 24, Nov 1, 1821.

W. YOUNG being appointed receiver of the estates of a lunatic, the plaintiff became one of his sureties, taking a bond of indemnity from him and another person. Young afterwards making default in payment, the plaintiff was compelled to pay into court a sum of 9167*l.*; and he soon after filed a bill against Young and several other persons, claiming under the bond of indemnity and the recognizance a lien upon the purchase money received for an estate of Young's that had been lately sold. A compromise was afterwards agreed to upon the terms of the defendant Young paying to the plaintiff a sum of money and his costs. The defendant Young accordingly paid the plaintiff's solicitor the sum of 261*l.*, which he stated to be the amount of the plaintiff's costs. The defendant was not furnished with copies of the bills, and he stated in his affidavit that he did not insist upon it, from being fearful that his doing so might have broken off the compromise. His solicitor stated, that he had at the time of the settlement called for the production of the bills, and that the plaintiff's solicitor had promised to deliver them if applied for at a future period; the latter denied having made such promise. A motion was now made on the part of the defendant, that copies of the bills might be delivered to him, and that they might be referred for taxation.

Mr Hart, in support of the motion.
Mr Buck, against it.

The Lord Chancellor. I think these bills must be delivered. Young being a receiver, was answerable for his own default; and Balme being his surety, had a demand over against him for whatever he might become liable for; not only for the principal money he might pay, but also for his costs and expenses; but before he could demand them, he ought to have had the bill taxed. I am decidedly of opinion, that unless solicitors expressly enter into an agreement for payment of untaxed costs, the court will say that they are costs to be taxed. But I go further, and desire it not to be understood that I consider them at liberty to agree for untaxed costs. And though I dare say the gentlemen meant very well,

(*a*) See Beer *v.* Ward, ante, p. 35. Robinson *v.* Mullett, 4 Price, 353. Cooke *v.* Wilson, 4 Madd. 380.

yet I think it was their duty to tell the plaintiff that he ought to have the costs taxed before he demanded them of Young. A party may, if he pleases, waive the benefit of taxation of the bill; but I will not hold that to have been done unless the solicitor had given him the knowledge that he may have it taxed. These bills must be delivered to the defendant, and with respect to taxing them, if the defendant thinks fit, he must apply separately for that purpose afterwards.

November 1.—The bills were accordingly delivered, and Mr Hart now moved that they might be referred for taxation.

Mr Lovat, on the other side.

The Lord Chancellor. The ground I go upon is this, that the plaintiff having claimed of the defendant the payment of certain sums of money, and agreeing to compromise the suit, they cannot introduce a condition for the non-taxation of the bills. There is nothing that ought to be guarded with so much jealousy as the right of the suitors to have their bills of costs taxed. At the time of the agreement, the plaintiff had a right to have the bill taxed; and it is interposed as one of the terms upon which the suit was to be terminated, that they should not be taxed. Now, I am of opinion, that such a condition is good for nothing. The court will not permit a party to say that the suit shall not be put an end to, unless the other agrees not to tax the bill of the solicitor.

Reg. Lib. A. 1820, fo. 2272.

Rundell *v.* Murray.

Jacob, 311.

An author having given a work to a publisher, who, by the sale of it, reimbursed his expenses and made considerable profit, cannot, at the end of the first fourteen years, restrain him by injunction from continuing the publication.

A court of equity frequently refuses an injunction where it acknowledges a right.

November 3, 6, 1821.

IN the year 1805, the plaintiff having written and composed, or collected a variety of receipts for cookery and other domestic purposes, offered to permit the defendant, a bookseller, to publish them, on his undertaking the expense, and giving her a few copies, and on his accepting the offer, she delivered to him the manuscript, which was nearly fit for publication. The defendant added a title-page, an index, and an engraving, and made some alteration in the arrangement; in November 1805 he published an edition of it, and entered it at Stationer's Hall as his property. The work contained an advertisement by the plaintiff, concluding with a hope that it might be useful to others: "In that idea," it proceeded, "it is given to the public, and as she" (the plaintiff) "will receive from it no emolument, so she trusts it will escape without censure." The sale of the work being rapid, the defendant published several subsequent

(a) See Langford v. Nott, 1 Jac. & Walk. 291.

[Rundell *v.* Murray.]

editions, and derived very considerable profit from the publication. The plaintiff made some additions to the different editions, and a table of contents and some engravings were added by the defendant. It appeared that in the year 1808, the defendant transmitted to the plaintiff a note for 150*l.*, mentioning in his letter that her gift to him had proved far more valuable than he expected. In her answer, acknowledging the receipt, she used these words: "I can truly say I never had the smallest idea of any return for what really was a free gift to one whom I had long regarded as my friend."

In the month of November 1819, the period of fourteen years from the publication having elapsed, the plaintiff notified to the defendant an intention of printing and publishing the work on her own account, and required him to desist from publishing any more copies. In the following month the defendant filed a bill praying an injunction to restrain the plaintiff from publishing those parts of the work which belonged to him, and from publishing the other parts with the title, embellishments and arrangements added by him, and from making any use of them. An injunction was obtained accordingly on the filing of the bill and affidavit.

The bill in this cause was shortly after filed praying an injunction to restrain the defendant from publishing the work. An injunction was moved for before the Vice-Chancellor: his honour offered the defendant a case, and upon his declining it granted the injunction. A motion was now made to dissolve it.

Mr Horne and Mr Shadwell, for the defendant.

The defendant does not claim title to the copyright of this work by any legal assignment, for it was not in writing as required by the statute(*a*), but the transaction amounts to a license to publish it, given him as a present by the plaintiff; in her letter she terms it a free gift, and in her advertisement disclaims all interest in the profits. After this she can have no right in equity to an injunction against one, whom she has induced to encounter the risk and expense of publication. It is true that in the event he has been reimbursed, but the court will not scan too nicely the precise amount of profit. Nothing passed between the parties from which the defendant could collect that he was only to be allowed to publish for fourteen years, and in the absence of any thing to limit it, the court must presume that the license given him was to endure as long as the plaintiff's right. In Carnan *v.* Bowles, 2 Bro. C. C. 80, an assignment of all the author's interest in the copyright was held to pass the contingent interest at the end of the first fourteen years.

Mr Heald and Mr Pepys, for the plaintiff.

The defendant, by declining the case offered him, disclaims any property in the copyright; and as it has been held that a parol assignment is void, he can, of course, have none. Neither has he any legal license, for the statute requires a license to be in writing, and attested by two witnesses(*b*). His only defence is upon the equitable ground of his having been induced to embark his capital in the speculation by the plaintiff's permission; and this is answered by the fact of his having, not only been reimbursed, but

(*a*) Power *v.* Walker, 3 M. & S. 7.

(*b*) The late statute 54 Geo. 3. c. 156, s. 4, dispenses with the necessity of attestation with respect to books subsequently published.

having derived considerable profit from it. Where copyright is assigned by the author, his contingent right in the event of his surviving the first fourteen years does not in general pass; the statutes [8 Anne, c. 19, s. 11, and 41 Geo. 3. c. 107, s. 1] having provided that it shall return to the author(*a*). If it be intended to pass, it is necessary to introduce special words, as in Carnan *v.* Bowles. If then an assignment in general words will not give an interest beyond the term of fourteen years, how can it be contended that a mere parol gift or license, without consideration, can have a greater effect?

The Lord Chancellor. Whether Mr Murray has a right to exclude the plaintiff or any one else from the publication of this work, is a question that I have now nothing to do with; I have only to consider whether this is a case in which a court of equity is at the instance of the plaintiff to enjoin the defendant.

It is clear that this court will interfere to enjoin publication, whether there has or has not been an entry of the work at Stationer's Hall, though the penalties cannot be recovered, unless it has been entered there. The owner of the copyright has, however, a right to bring an action for invading it, and upon that this court has founded the right to have an injunction, on the ground that if it were necessary to bring action after action, the expense of asserting the title might exceed the advantages to be derived from it. There are, however, cases where this aid is not to be called for.

We are not apprized of the circumstances under which this manuscript was given. If the plaintiff had composed these receipts, or embodied and arranged them in a book, she would have a copyright in it, but if she had only collected them, and handed them over to Mr Murray, I do not apprehend that they would be the subject of copyright. But taking it for granted that there was a copyright, as the point is not disputed, the mode of publication furnishes a ground for contending that the person publishing it did not intend to claim any copyright in the work. It is settled now that an assignment of copyright must be in writing, although it frequently happened that courts of equity had granted injunctions at the suit of persons claiming under assignments not in writing, until we were set right by a decision of the court of King's Bench. I conceive that an author will not be taken to have assigned his contingent right in case of his surviving the fourteen years, unless the assignment is so expressed as to purport to pass it; but I have been at a loss throughout the argument to understand what difference the expiration of that term can make in this case.

The plaintiff in her advertisement expresses a hope that her work may be useful to others; "in that idea," she says, "it is given to the public." If she had stopped there, the expression is one frequently used by authors, although they expect emolument from the work, but she proceeds to say that she will receive no emolument, and with this declaration it is put into the hands of Murray. I do not enter into the question whether he has any property in it, but we find that this lady, abjuring all right in herself,

(*a*) The late statute 54 Geo. 3. c. 156, s. 4, by which the term is extended, is differently expressed. It is enacted, "that from and after the passing of this act, the author of any book or books composed, and not printed and published, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same; and also, if the author shall be living at the end of that period, for the residue of his natural life."

and saying nothing about the term of fourteen years, gives it to him, and he publishes it, at the hazard of all questions attending it, and under the assurance that she is to receive no part of the profit.

It is said that upon the principles of cases in this court, a party who has been led into the expense of a publication by the encouragement and acquiescence of the author, shall not be enjoined by a court of equity till he has been brought home. But here the plaintiff said, you may go to work with this book as long as you please, for no limitation of time was mentioned; and where such encouragement has been given, it is not enough to say to a tradesman that he must relinquish it, when he has received his expenditure back again; for he may have withdrawn his capital and his attention from other matters in which they might have been more profitably employed, without being liable to this difficulty. In making the plaintiff a present, he did what he ought to do, and what I hope he will continue to do, recollecting that it is through her kindness that he had the opportunity of making it. She received it with the gratitude of a person who considered it not to be her right. If it is to be argued that as soon as he was reimbursed he was to discontinue the publication, why should he not have ceased then?

It requires, I think, a great deal of ingenuity to argue that, because a general assignment in writing will endure only for fourteen years, that, therefore, when a person makes a free gift by parol, without any statement with respect to its duration, it is to be considered as an effectual assignment for fourteen years, and that at the end of that period the court is to treat it as a case in which a gift for fourteen years only was intended. There has often been great difficulty about granting injunctions, where the plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and, therefore, without saying with whom the right is, whether it is in this lady, or whether it is concurrently in both, I think it is a case in which strict law only ought to govern.

Injunction dissolved.

Tibbits *v.* Tibbits.

Jacob, 317.

A recommendation by a testator to his son to continue his nephews in the occupation of their farms as heretofore, and so long as they continue to manage the same in a good and husband-like manner, and to duly pay their rents, is imperative.

A testator leaving to his son and heir his real estates, and the residue of his personalty, with a recommendation to continue his nephews as tenants on an estate settled on the son, the latter decreed to elect either to continue them as tenants, or to make them a compensation for the value of the tenancy out of the property given him by the testator.

June 28, Nov. 9, 1821.

BY a settlement made in July 1791, upon the marriage of the defendant

[Tibbits *v.* Tibbits.]

Charles Tibbits with Mary Woodyear, certain estates were settled to the use of Richard Tibbits, his father, until the marriage, and after the marriage (subject to a jointure of 800*l.* per annum to Mary Woodyear, and to a term of ninety-nine years for securing it), to the use of Richard Tibbits for life, with remainder to the use of Charles Tibbits for life, with remainder to his first and other sons in tail male, with an ultimate remainder to Richard Tibbits in fee. The settlement contained a power to the tenants for life to lease for twenty-one years in possession, and a power of sale to be exercised by the trustees with the consent of the tenants for life.

Richard Tibbits by his will, dated in June 1808, gave all his freehold, copyhold, and leasehold estates in the counties of Northampton, Warwick, and Middlesex or elsewhere, to the defendant, to and for his own use and benefit absolutely for ever; charged with an annuity to his wife, and with a sum of 10,000*l.*, to be paid after her death as she should appoint. The will contained the following clause:

"And I do hereby recommend to my said son to continue his cousins James Tibbits and Richard Tibbits in the occupation of their respective farms as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents."

The testator gave to James Tibbits and Richard Tibbits the sum of 100 guineas each, and appointed the defendant his executor and residuary legatee. He died in July 1808, leaving the defendant his only son and heir at law, without having exercised the power of leasing over the settled estate. The defendant proved the will, and took possession of the property devised to him.

The farms mentioned in the will were part of the premises included in the settlement, and had been in the occupation of James and Richard Tibbits respectively, as yearly tenants, for several years before the testator's death. In the course of a year after that event, an increase of the rents was required of them by the defendant, and in consequence of their refusing, he commenced ejectments. In January 1810 they filed a bill for an injunction to restrain the ejectments, and praying that the defendant Charles Tibbits might be decreed, either to permit them to continue in the occupation of their farms at the former rents, or that he might renounce all benefit under the will of the testator. The defendant in his answer stated that his father had told him, speaking with reference to the above clause in his will, that though he recommended the plaintiffs as tenants, he did not expect the rents to be continued the same, but that the defendant had a right to have a fair rent, and that the clause in question was not intended to fetter him. An injunction issued, and a motion afterwards made to dissolve it was refused by the Master of the Rolls, (Sir W. Grant) sitting for the Lord Chancellor; the injunction was continued till the hearing, 2 Mer. 96, n. The plaintiff Richard Tibbits having died during the suit, it was revived by his executors. It came on for hearing, and was argued in November 1816(*a*), and now stood for judgment.

The Lord Chancellor. The first question in this cause was upon the words "and I do hereby recommend, &c.;" whether they were or were not imperative, and I was of opinion that they were.

The other question was, whether the defendant, in the event of his

(*a*) See the report in 19 Ves. 656.

[Tibbits *v.* Tibbits.]

electing to take against the will, is bound to forfeit all the benefits he takes under it, or whether he is only to make a compensation to the plaintiffs for what the testator intended them. On this point I have looked through all the cases with great attention, and they contained many dicta, not easily reconciled. Though it would perhaps be too much to say that that should be the rule universally, I think this is a case for compensation only. I am of opinion that there may be cases where not only compensation is to be made, but the whole is to be given up. I think the old principle of the court, till shaken by some later determinations, was compensation, but it has since been shaken(*a*).

Nov. 9.—The case was mentioned again upon a motion to vary the minutes, when the Lord Chancellor was of opinion, that the plaintiffs were entitled to the occupation of the farms only during the joint lives of the defendant and themselves respectively, and that the costs of the suit, as arising out of a doubt on the testator's will, were to be paid out of his assets.

The decree declared that, according to the true construction of the will, the defendant was bound, either to permit the plaintiffs to hold the said farms in their respective occupations, at the time of the death of the testator, as tenants thereof, at the same rents, and under the same conditions as they held the same as tenants to the testator, they duly paying such rents, and managing the same in a good and husbandlike manner, during the joint lives of the plaintiffs and the defendant C. T., or to make compensation to the plaintiffs, out of the property given to the defendant by the testator's will, for the value of such tenancy; and it appearing that the plaintiff R. T. died on or about the 11th of April 1813, and that he held and enjoyed his said farm to the time of his death, and duly paid his rent, and complied with the terms of the will in the cultivation of the said farm, and that after his death the possession thereof was delivered up to the defendant Charles Tibbits; it was not necessary to give any further relief in respect of that farm. And as to the farm occupied by the plaintiff J. T., the defendant was forthwith to elect before the Master whether he would permit the said plaintiff so to hold and occupy the said farm according to the will, and in case the said defendant should elect to permit the plaintiff so to hold and enjoy the said farm, the injunction was to be continued, and the said plaintiff J. T. to be quieted in such possession during so long as he should duly pay his rent, and manage the same in a good and husbandlike manner: and in case the said plaintiff should fail so to do, the defendant was to be at liberty to apply to dissolve the injunction, and for such other purposes as he should be advised. But in case the defendant should elect not to permit the said plaintiff to hold and enjoy the said farm according to the terms of the will, then the Master was to inquire and ascertain what was the value of the tenancy of the said farm to the said plaintiff, to be held and occupied at the rent, and according to the terms of the said will, during the joint lives of the said plaintiff and of the defendant, and the defendant was to pay to the said plaintiff, out of the property devised and bequeathed to him by the will of the testator, what the Master should find to be such value, and upon payment of such value the said plaintiff was to deliver up the possession of the said farm, at such time, and under

(*a*) See this question discussed in 1 Swanst. 433, note. Sugden on Powers, p. 380, third edition. Roper on the Law of Husband and Wife, second edition, vol. i. p. 566, note.

such circumstances as the Master should for that purpose appoint. And in case the defendant should not admit that the property possessed by him under the will of the testator was sufficient to make such payment and compensation to the said plaintiff as the Master should find to be due to him, then the Master was to take an account of the property which had come to the hands or possession of the said defendant, or any other person or persons by his order, or for his use, or which, without his wilful default, might have been received under the will of the said testator; and in that case further directions concerning the same were reserved. And the costs of the plaintiffs in this suit were to be taxed by the Master, and paid by the defendant to the plaintiffs out of the assets of the testator come to his hands.

Reg. Lib. B. 1820, fo. 2123.

Jones *v.* Tripp.

Jacob, 322.

Held, that an attorney cannot take a mortgage from his client for securing future costs. Nov. 15, 1821.

BY indenture, dated the 31st day of October 1817, J. Lewis (a defendant) mortgaged certain estates to the defendant Tripp. The plaintiff was a prior mortgagee upon the same estates for 600*l.*, and was also a creditor of Lewis for a further sum, to recover which he commenced an action in Easter term 1817: Lewis suffered judgment to go by default; and a writ of inquiry having been issued and executed in November 1817, the plaintiff obtained final judgment against Lewis for 2586*l.*

The bill in this cause prayed a foreclosure, and alleging that the deed of October 1817 was executed fraudulently, for the purpose of defeating the plaintiff's security, prayed that it might be delivered up to be cancelled, and that the plaintiff's judgment debt might be tacked to that due upon the mortgage. The consideration for the mortgage of October 1817 was a sum of 70*l.*, stated to be due to Tripp for business done by him as the attorney of Lewis, and it was made to secure that sum, and also the costs of such actions and suits as Tripp might afterwards defend or prosecute for Lewis, and all sums that he might pay on his account, not exceeding in the whole the sum of 1000*l.* Tripp was subsequently employed as attorney for Lewis, and he stated the amount of the debt now due to him to be more than 1000*l.* He was apprized of the plaintiff's judgment, having been attorney in the action.

The Vice-Chancellor, at the hearing of the cause, directed an issue to try whether the indenture of the 31st of October 1817 was fraudulently contrived and executed, as against the plaintiff. A verdict having been found in the affirmative, the defendant Tripp moved for a new trial; the motion was refused by the Vice-Chancellor, and was now renewed before the Lord Chancellor.

Mr W. E. Taunton, for the defendant.

The Lord Chancellor stopped the motion, by staying that it was a case in which an issue ought not to have been directed. The court would not permit an attorney to take from his client a mortgage for costs to be incurred; the inducement for Lewis to execute the deed was, that Tripp should proceed in his business for him; such a security cannot be allowed. The deed on the face of it is not supportable; so clearly so, that I cannot permit it to be argued; and I should be shaking the jurisdiction of the court if I allowed a trial on such a subject; it would be to leave to a jury to decide a point of law that is well settled. If any distinction can be made as to the 70*l.* due at the date of the deed, that would only be a reason for a re-hearing: and whether the court will allow the deed to stand as a security for that sum, considering its other contents, is a point I will not decide, because it can be no ground for granting a new trial(*a*).

Mr Koe, for the plaintiff.

Motion refused, with costs.

Bowes *v.* East London Water Works Company.

Jacob, 324.

Devisees in trust, having the legal estate, with a power of leasing in possession, until the cestuique trusts attained twenty-one; leases not conformable to the power held void in equity, and not confirmed by acceptance of rent.

Jan. 19, 1820; Sept. 4, Nov. 15, 1821.

THIS cause, reported in 3 Mad. 375, came on upon appeal from the decree of the Vice-Chancellor. It appeared that the lease of December 1786 contained a recital of a fine of 250*l.* having been paid. The cause had been originally heard on admissions, agreed to by the parties, in which the leases were admitted to the purport stated in the bill, and the bill did not set forth this recital. The answer of the London Dock Company stated their belief that if any fines had been paid, the money had been applied towards procuring renewals of the original leases. The leases also contained covenants for the title, on the part of Ord and Planta the trustees.

Mr Hart and Mr Horne, for the plaintiff, contended, that the leases being unauthorized by the power, and the lessees having notice of the will under which the trustees acted, the decree was right in declaring them to be void.

The attorney-general and Mr Phillimore, for the London Dock Company, Mr Wetherall and Mr Spence, for the East London Water Works Company.

The leases were made by persons having, as devisees in trust, the whole legal interest in them, coupled with a power of leasing, during the minority of the *cestuique* trusts. This power they have deviated from; the leases are, however, unquestionably good at law; and there is not any

(*a*) Williams *v.* Piggott, post.

substantial objection to them in equity. It is not suggested that they were improvidently made, that a better rent could not have been procured, or that they were in any respect detrimental to the interests of the *cestui que* trusts. It is only by a technical rule that a lease, the operation of which is postponed for a few days, is bad under this power; why should that rule be adopted in equity? The trustees had a legal power of making the leases in question, and were not forbidden by the will. At the time of the lease of 1798, the legal estate had not been conveyed, and there was no one but the trustees that could grant a lease.

The leases, if not originally binding on the plaintiff, have become so by his acceptance of the rent for a period of nine years. It is not like the case of a remainderman receiving rent upon a void lease, for these leases were made by parties actually entitled; they were binding on the defendants, and at most only voidable by the cestui que trusts by bill in equity. The receipt of rent has therefore affirmed them.

If the leases were to be set aside, the decree ought to have directed an inquiry as to what has been expended on substantial repairs and improvements. The plaintiff, after so long an acquiescence, cannot be permitted to claim the benefit of expenditure going on under his eyes, upon the faith of these leases.

Another objection to the bill is, that Ord and Planta, or their representatives, should have been made parties. They are charged with a breach of trust; and in the event of its being proved, they are rendered liable to actions upon their covenant.

Mr Hart, in reply.

The legal dominion of the property vested in the trustees, was coupled with a declaration of trust in the will, plainly indicating the extent to which they might act; to go beyond it was a breach of trust. There is no evidence of any assent on the part of the plaintiff to preclude him from raising the question; for it does not appear that he was apprised of the nature of the lease under which the defendants were holding; nor is there any evidence of improvements having been made. The objection for want of parties is not noticed in the petition of appeal.

The Lord Chancellor. The bill, as I understand the case, is filed by Mr Bowes, who became entitled to this property in the year 1806. George Bowes came of age in 1792, and died in 1806. The bill states the will of Mrs Bowes, but whether the parties have put upon the record enough of it to enable the court to decide, I cannot say without examining it, for there may be parts in the will very important, besides what are stated here. As I understand it, it is a bequest to Mr Ord and Mr Planta, of the leases during the continuance of the lives, and upon trust to renew them from time to time; the whole leasehold estate and interest was in them. I take it the rule of law is, where a person has an interest and also an authority, that a lease not made according to that authority, though not good under it, will be good, taking effect out of the interest; but Mrs Bowes's will means, I think, this; I have given you the estate, to enable you to deal with it as trustees till the cestui que trust shall come of age; and that being my object, it was necessary you should have the whole estate in you, but not that you should make use of that interest for the purpose of giving derivative estates larger than those which I point out by the power conferred on you. The meaning was, you are to take the whole interest, but do not make leases in reversion or for a fine, or for less than the best

[Bowes v. East London Water Works Company.]

yearly rents, and when the cestui que trusts are of age, then do not make any leases. The devise and the power taken together, seem to amount to this, that though they were to have the whole interest, yet they were not to make leases when the parties came of age, and before theircoming of age, they were not to be entrusted to make leases for a fine or foregift, or in reversion, or for less than the best yearly rent.

It appears that in 1786, G. Bowes not being then of age, the trustees make a lease for thirty-three years, which would expire just now; it was not questioned till this bill was filed, twenty-nine years after the date of it. The bill seems to charge, what I think it was quite unnecessary to charge, but what I believe to be truly charged, that this was not only a lease in reversion (for though certainly the interval was short, yet it was in reversion), but that a fine was paid. This I believe, and also that it was the case with the lease of 1796: I say so, on the ground of what I have seen since I have sat here in causes concerning this family, of the difficulty that these trustees had in getting on, without raising money by means not authorized by their trust. But I take it to be true, that they took the sum to be able to renew the leases; if that be so, I do not say what would be the effect; but it becomes the court to ponder long, before it visits as a breach of trust that to which alone it is perhaps owing that any of the estate remains. Suppose Messrs Ord and Planta were before the court, and could show that this estate was so embarrassed, that they thought they were doing better to renew the leases, even by what may be a breach of trust; and that it was owing to that, that there was now any interest in the estate left. It is not necessary to deny, that the party when he came of age might object, but it would be a strong case if the court were to suffer him to do so, after going on for several years, adopting the act of his trustees. If it had been Georges Bowes, could he say, I have been receiving the rents from 1798, I filed no bill till 1815; and though it turns out that my trustees got 250*l.* on the one lease and 500*l.* on the other, and applied it to the renewals, the benefit of which I take, yet I will now, after so many years, set this aside, and expose my trustees as for a breach of trust. If that were to be allowed it would be a very strong case; it would be stronger, if it be true as was asserted, that they covenanted generally for the title; but I believe it will turn out that they covenanted only against the acts of themselves, and those claiming under them; and in that case I am not sure that it would be necessary to make them parties. But then we should have to regret that the pleadings were not so framed as to call in aid their knowledge of the circumstances; they might, perhaps, have proved, that though fines were received, yet that they had, in making leases, made such bargains as to enable them to do something beneficial to the cestui que trust. We must consider the receipt of the rent by the cestui que trust for this period, and whether with or without knowledge of the facts is not of much importance; for after a long time that would be presumed.

I think it must be said that if you cannot make this out to be a breach of trust as against the trustees, you cannot complain of it against the persons to whom the leases were granted. If the granting the leases by the trustees was not such a breach of trust as you can now complain of, you cannot now complain of those who took the leases. The question then is, whether now at this distance of time you could succeed against the trustees.

[Bowes *v.* East London Water Works Company.]

September 4.—The Lord Chancellor. I do not observe that the will of Mrs Bowes gives any power of leasing to the tenants for life, and that seems a material circumstance. It appears to have been finished by the usual clause to indemnify the trustees; but then it occurred to the person who drew it, that some power of leasing should be given to some one, and this power is therefore added. It is clear that it was copied very much from the ordinary powers of leasing, without attending to the circumstance, that as to the freeholds the trustees had an estate only for ninety-nine years, which would expire when the trusts were satisfied; and that as to the leaseholds, they had an estate vested in them not limited in duration, but for an absolute interest during the whole of the terms. If nothing had been said in the will, no question could have been raised as to any lease they might make, not under a power, but out of their interest, except the questions that might arise with respect to any other trustee, upon consideration of the matter as affecting the interest of the cestui que trusts.

In the lease of 1786, they are described as the executors of Mrs Bowes, and as devisees in trust; the description of the lessors, therefore, conveys express notice that they were devisees in trust, and those who take under the lease cannot say that they had not notice of the will.

The lease, if granted in consideration of 250*l.*, would be objectionable on the ground of a fine being taken as well as rent, considered as a lease under the power. It is also objectionable on the ground of its being a lease in reversion; for though it was made only on the 20th, and to commence on the 25th, it was not the less in reversion from the interval being so small. There was another circumstance, that till the Jersey case might have been rejected, a power of re-entry was required; and the conveyancer who drew the lease thought the power was well reserved by limiting it in the event of the rent being behind for twenty-one days. This, if it is to be considered as a lease under a power, would have made another objection, had not the point been put out of the question. This lease has since become vested in the defendants. At the time when the second lease was made, George Bowes was of age; the bill insists that the power of leasing had then ceased, and that both the leases are therefore void.

A bill in equity could not have been sustained, had not the legal estate been in the trustees; if the legal estate had been in the plaintiff, the remedy would have been at law. But it was necessarily brought into equity, for whatever limitation there may be to the power of leasing by the trustees, yet by virtue of their interest they could make a lease good at law; and the question is, whether the leases they have made by virtue of that interest are to be considered, under all the circumstances, as abuses of their trust.

It is stated in one of the answers, that in the leases no notice is taken of any sums having been paid as fines; and I observe that in the admissions consented to, nothing is said as to fines, or as to expenditure either substantial or otherwise having been made upon the premises. The cause came to a hearing without any evidence of the payment of any fines.

The decree declares the leases to be void; by which, I presume, it is to be understood that they were void in equity; for the lessors having the legal estate, the power did not restrain their faculty of dealing with it at law; but it might be an intimation of the pleasure of the testatrix, that they were not to be at liberty to deal with it except in the manner prescribed.

Where a lease made by a tenant for life is void as being bad from not

conforming to a power, nothing done afterwards will amount to a confirmation. When it is voidable only, acceptance of rent, with other circumstances, may be a confirmation. Considering this merely as a lease under the power, I do not think that George Bowes taking the rent could affect Thomas Bowes; the act of the first tenant for life would not operate as a confirmation of leases that were void. If they were voidable only, acceptance of rent, and standing by while improvements were making, would be material; but if the leases be void, I do not know of any case in law or equity by which compensation for improvements can be compelled. The peculiarity is, that we are to consider what is to be the effect of the insertion of this power at the end of the will. If the will does not authorize the trustees to make any leases after G. Bowes was of age, if the power of leasing cuts down the power that results from their interest, it is one of the most defective instruments that I ever saw; for then nothing could be done by the trustees, and nothing could be done by the tenants for life beyond their own lives.

I am ready to say it does appear to me to have been the intention of the testatrix, to be collected from the power, that the trustees should not make leases, except during the minorities of the tenants for life, and except under the restrictions imposed by the power. I think the power must be taken to be legal evidence that that was her intention; but she has not contrived so as to prevent them from doing it by means of their interest, and if the legal estate given them has authorized leases, which, in strict law, are good leases, the question then is, upon what terms a court of equity is to permit the plaintiff to disturb the legal title, derived from the legal title of the trustees.

It is clear that the acts of George Bowes cannot affect Thomas, with respect to whom there is no evidence of any improvements being made in his time, much less with his knowledge. If George Bowes allowed the defendant to make improvements, and Thomas Bowes has since allowed them to take the benefit of them, it would be no ground for saying that he ought not to set aside the leases. But if, after his time, he had permitted them, with his knowledge, to involve themselves in a great expenditure, it would be a circumstance to be noticed, if they were encouraged in it by his conduct; but there is no such fact in evidence in the case. However, if the parties should suggest that improvements have been made in the time of Thomas Bowes, and should desire to have an inquiry, whether any and what improvements have been made, and whether with his knowledge, that may be considered of.

It comes to this, that the power inserted in the will, being taken as evidence of what leases they were to make, they have made others not conformable to what a due attention to the trusts required; the ulterior question does not arise, unless such a suggestion as I have alluded to be made.

November 14.—The attorney-general, on the part of the defendants, stated that considerable improvements had been made in the time of the plaintiff, and desired an inquiry, adding that the defendants were not prepared to show that the improvements were made with the knowledge of the plaintiff.

The Lord Chancellor said, that if they could have any compensation, it could only be upon the ground of the plaintiff's standing by and seeing

them lay out their money, and as that was not the case, affirmed the decree.

Reg. Lib. A. 1821, fol. 289.

Ex parte Atkinson, in the matter of Parkinson.

Jacob, 333.

Return to a commission of lunacy, that the party is a lunatic, enjoying lucid intervals, and that during such intervals he is competent to the government of himself and his affairs, quashed, and a new commission issued.

November 21, 23, 1821.

THE jury under a commission of lunacy against Thomas Parkinson returned "that the said T. P., at the time of taking this inquisition, is a lunatic, enjoying lucid intervals, and during such lucid intervals, he is competent to the government of himself, and the administration of his own affairs." A petition was presented praying a reference to approve of a committee, or such other order as the court might think fit.

Mr Hart and Mr Clayton, in support of the petition.
Mr Shadwell, Mr F. Pollock, and Mr Spence, against it.

The Lord Chancellor expressed his opinion to be, that he could not make a grant of the committeeship upon this finding, and directed a search to be made as to the course of proceedings in similar cases.

Several precedents of inquisitions were afterwards produced from the office of the secretary of lunatics. That in the case of Mary Halsey(*a*), in 1734, was mentioned.

November 23.—The Lord Chancellor said he thought nothing could be done but to issue a new commission. There was no instance of a *melius inquirendum* in such a case(*b*).

It was then objected, on the part of the supposed lunatic, that a commission was unnecessary, the evidence showing that he was in such a state

(*a*) This case is noticed in Ex parte Barnsley, 3 Atk. 168. The first return was, that Mary Halsey "is not a lunatic, but is not of sufficient understanding to manage herself nor her affairs." This inquisition was quashed, and a new commission issued by Lord Chancellor Talbot, and in the May following an inquisition was returned, "that the said Mary Halsey is not sufficient for the government of herself and her estate, and for near twenty years last past the said M. H. has been affected with the same weakness of judgment and understanding." It appears by the statement in Ex parte Barnsley, that a grant of the committeeship was made upon this inquisition.

Amongst the precedents produced was that in the case of Frances Waller, 18th of June, 8 G. 2., which is probably the same as Mrs Wall's case, referred to in Ex parte Barnsley. She was found "worn out with age, so that she is not capable of the government of herself, her messuages, &c." Upon this return it appears that a grant was made.

(*b*) See Ex parte Cranmer, 12 Ves. 445, 454.

[Ex parte Atkinson.]

of mind as to be competent to the management of himself. His lordship said that a short petition might be presented against the issuing of the commission. This was afterwards done, and affidavits were filed on both sides: his lordship, on reading them, was of opinion that it was a proper case for a commission, and, in consequence, a new commission issued.

Edwards *v.* Edwards.

Jacob, 335.

Demurrer allowed to a bill stating in the alternative a title at law or in equity.
Nov. 25, 26, 1821.

THE argument of this case before the Vice-Chancellor is reported in 3 Madd. 197. A case having been then directed for the opinion of a court of law, the defendant appealed.

Mr Hart and Mr Blake, in support of the demurrer.

The bill, stating that the testator had a power of revocation, to be executed by any deed or writing to be signed, sealed and delivered, and attested by two witnesses, alleges, that being desirous of exercising it, he made his will, duly executed and attested, as required in the case of devises of real estates, by which he gave the estate in question to the plaintiffs. It then, after insisting that the will was a good execution of the power at law, and if not, that it is good in equity, prays that the defect, if any, may be supplied against the defendant. Now, if it was a good execution at law, the plaintiffs can have no remedy in equity; and the bill leaves it in uncertainty whether the title which they mean to rely on is legal or equitable. A plaintiff, however, must state a clear case for equitable jurisdiction; the court cannot act upon a hypothetical bill, desiring relief either at law or in equity, according to the result of the argument.

It is stated that the will was executed according to the statute of frauds, which is not inconsistent with its having been sealed and delivered according to the power; and if that was the case, as must be intended against the pleader, then, upon the authority of Kibbet *v.* Lee, Hob. 312, and Roscommon *v.* Fowke, 4 Bro. P. C. 523, the power was well executed at law, though the instrument was a will instead of a deed. Besides, this is not a case for supplying a defective execution, the parties having equal equities, and the plaintiffs being provided for with other lands by the same will. M'Adam *v.* Logan, 3 Bro. C. C. 310; Montague *v.* Bath, 3 Ch. Ca. 55.

Mr Horne and Mr Pemberton, for the plaintiffs, argued that it was in substance sufficiently alleged in the bill that the will was not a legal execution of the power of revocation, wills not being usually sealed, and there being no statement that this will was, and therefore that the case did not resemble Kibbet *v.* Lee, or Roscommon *v.* Fowke, where the instruments, though wills, were executed with all the formalities required by the powers. With respect to the plaintiff's equity, it is clear that the defect would be supplied. Chapman *v.* Gibson, 3 Bro. C. C. 229; Hills *v.* Downton, 5 Ves. 557.

[Edwards *v.* Edwards.]

The Lord Chancellor. My opinion is, that the plaintiffs ought to state distinctly whether their case is at law or in equity.

Demurrer allowed.
Reg. Lib. A. 1821, fol. 1131.

Cox *v.* Allingham.

Jacob, 337.

Permission to exhibit an interrogatory as to the loss of a deed omitted to be proved by mistake, given to the plaintiff at the hearing, under the circumstances.

A document which is stated in the bill, and which the answer admits and refers to, cannot be read from the bill at the hearing, but must be produced.

Rolls.—July 24; Aug. 2, 3; Nov. 12, 29, 1821.

THE bill stated a lease for twenty-one years made by J. Paul to J. Salter, by indenture bearing date the 26th of August 1789, containing a covenant for renewal for another term of twenty-one years. The term had since become vested in the plaintiff, and the bill filed in 1810 prayed a specific performance of the covenant for the renewal against the defendant Allingham, to whom it stated the interest of Paul to have been assigned. Allingham, by his answer, stated that Paul, at the date of the lease, was entitled to the premises for a term of ninety-seven years, and that on the 29th of October 1789, he granted the defendant an underlease for the whole of the term except ten days; he insisted that he was not bound by the covenant. H. Ellanor, to whom Allingham had granted a lease, was afterwards made a party. The defendants, by their answers, admitted the original lease of August 1789, referring to it when produced.

On the cause coming to a hearing, on the 1st of June 1816, after it had been partly discussed, it was objected that the representatives of Paul ought to have been made parties, and the cause stood over with liberty to add them.

At the hearing in June 1816, the original lease to Salter was produced on the part of the plaintiff; it being afterwards lost by his solicitor, a supplemental bill was filed, stating the fact of the loss, and setting forth a copy, for the purpose of having it read in evidence. Witnesses were examined to prove the loss of the deed, and the accuracy of the copy. The proper parties having been added, the cause and the supplemental cause now came on for hearing.

Mr Agar and Mr Lovat, for the plaintiff.

Mr Wingfield and Mr Sugden, for the defendant Allingham; Mr Horne and Mr Barber, for the defendant Ellanor.

On the part of the plaintiff, the copy of the lease of the 26th August 1789, was produced, and the evidence of the plaintiff's solicitor was read to prove the loss of the original. He stated that he had lost it, but did not mention any search having been made for it. It appeared that the interrogatory upon which he was examined, did not inquire as to a search.

[Cox *v.* Allingham.]

The MASTER of the ROLLS was of opinion that there being no proof of any search having been made for the deed, the loss of it was not established so as to make secondary evidence admissible.

On the part of the plaintiff, it was then proposed to read the statement of the deed from the bill, it being admitted by the answers; and Owen *v.* Jones, 2 Anst. 505, was cited. The counsel for the defendants objected, that as the answers referred to the deed itself when produced, the admission of its being correctly stated in the bill was qualified by this reference, and therefore the production of the original could not be dispensed with; besides which, the bill did not set it forth *in hæc verba*, but only contained the tenor and effect; though it was necessary that the whole should be seen.

The MASTER of the ROLLS said that it must be a very explicit and unqualified admission to dispense with the production of that which constituted the foundation of the suit; nothing short of that would be sufficient, even if that would do. But the reference distinctly calls for the production, reserving to the defendant a more particular investigation of it, when it shall be produced.

The counsel for the plaintiff then pressed for permission to go into evidence to prove the loss of the deed, either on a reference to the Master, or by exhibiting an interrogatory for that purpose. They urged that the omission arose entirely from accidental mistake, and that where parties were by a mere slip deprived of testimony, the court was often in the habit of indulging them with leave to rectify it. Thus where dispositions have been suppressed from the interrogatories being leading or for irregularity, or where it has been discovered that a proper release has not been given to make a witness competent, fresh interrogatories and a re-examination have been permitted. Spence *v.* Allen, Gilbert, 150. Prec. in Ch. 493; Lord Arundel *v.* Pitt, Amb. 585; Sandford *v.* Paul, 2 Dick. 750. 3 Bro. C. C. 370; Shaw *v.* Lindsay, 15 Ves. 380; Cholmondeley *v.* Clinton, 2 Mer. 81; Perry *v.* Silvester, vide ante, 38. They also cited Griells *v.* Gansell, 2 P. W. 646; Kirk *v.* Kirk, 13 Ves. 280; Bloxton *v.* Drewit, Prec. in Ch. 64; Banks *v.* Farquharson, 1 Dick. 165. Ambl. 145; Attorney General *v.* Thurnhall, 2 Cox. 2; and Milward *v.* Atkins(*a*).

On the other side it was insisted that the practice of the court would not permit the foundation of the plaintiff's title to sue to be made the subject of a reference; Lechmere *v.* Brasier, 2 Jac. & Walk. 287. They distinguished most of the cases cited, where leave had been given to exhibit interrogatories, as being applications made before the hearing, which were different from the case of a plaintiff perceiving a defect in his evidence, and, nevertheless, going to a hearing, launching his cause, and

(*a*) In this case the evidence of a bankrupt, who had been examined on the part of the plaintiff upon an inquiry before the Master, was objected to, on the ground of his being interested. He afterwards gave a release to his assignees, which was stated to have been previously omitted by mistake. On motion before the Vice-Chancellor, leave was given to re-examine the bankrupt on the same interrogatories on which he had been before examined, and to examine other witnesses to prove his certificate and the release: the plaintiff paying the costs of the application and of the former examination, as between solicitor and client. 20th July 1820. Reg. Lib. B. 1819, fol. 1371. A motion made before the Lord Chancellor to discharge this order was refused. 31st May 1821. Reg. Lib. 1820, fol. 1404.

taking his chance of succeeding; under such circumstances a plaintiff ought to bear the consequences of his error; he would otherwise have an opportunity of trying the feeling of the court, and then mending his case when he found it weak. They referred to White *v.* Damon, 7 Ves. 30, where a decree dismissing the bill was affirmed, on the ground of the witness, who was interested, not having been released, and relied upon Lake *v.* Skinner, 1 Jac. & Walk. 9. They also submitted that the court could not entertain the question, except in the shape of an application founded on affidavit.

The MASTER of the ROLLS concurred in the latter observation, and directed the cause to stand over, with liberty to the plaintiff to apply.

A petition was now presented by the plaintiff, praying for leave to exhibit an interrogatory for the further examination of his solicitor, as to the loss of the original lease. The solicitor and his clerk stated, that after attending the court at the hearing in June 1806, the deeds produced were tied up together and taken away; and it was not till a few months after that they found the deed in question not to be amongst them. They had made repeated searches for it, but had been unable to find it; and they as well as the plaintiff stated that they were entirely ignorant of what was become of it. The solicitor said that the only reason why he did not in his depositions mention the search, was, that the interrogatory did not extend to it; and that it did not occur to him that it was necessary or material.

The argument was to the same effect as on the former occasion.

The MASTER of the ROLLS stated his strong impression of the dangers that would arise, if in every instance a party, whose case broke down at the hearing, were to be at liberty to go into further evidence. To encourage it would be to subvert the whole practice of the court; and I wished, therefore, some distinction to be pointed out, to justify the court in granting the indulgence in this case, without establishing a dangerous precedent. The onus certainly lies upon the plaintiff. At the same time, it is too late to argue that there can be no case of exception to the general rule, after it has been departed from in some instances, and by great authorities.

I am entirely satisfied as to the history of this omission; it must be taken to have been quite unintentional. There may be cases of very deep design, where something may be purposely left out, in order to have a better opportunity of examining after publication passed; the court ought, therefore, jealously to watch the conduct of the parties. I cannot here find any trace of such a plan. It was proper to put the plaintiff to make the application upon affidavit, as there might be reason to suspect that the deed had been handed over to some other person; the affidavits are uncontradicted, and I think they form a clear ground for believing that the deed was accidentally lost. It was produced in court, and by some accident was left out of the bundle of papers that was carried away, and though searched for, it has not been forthcoming since. If what is now stated had been adduced in evidence at the hearing, there is no doubt that the copy would have been received. The present must certainly be considered as a strong case; the plaintiff was under no surprise; he knew that this must be proved; it was the foundation of a separate bill: it was not a newly discovered fact. It is true, also, that where there is any slip or mistake, either by the counsel or solicitor, the party must suffer the consequences.

[Cox *v.* Allingham.]

Let us consider what would be the result at law, if the plaintiff coming to trial had omitted to produce a necessary witness; he must unquestionably fail, but how would he fail? It would not be a decision binding on his right, or barring another action; it would be a nonsuit. Then if the same thing happened in equity, what would be the analogy? The court would not dismiss the bill without liberty to file another: the court would not decide it finally and conclusively; so that the dismission might be pleaded in bar to a new trial. The plaintiff would pay the costs, but he would be able to proceed again, after having the benefit of knowing the evidence. This certainly ought to weigh with the court, particularly as the same strictness is not observed here as at law.

In many instances the court permits accidental omissions to be supplied where it sees that to do so will be more beneficial to the parties, and more conducive to the ends of justice. The court is disposed to do so from the infirmity that necessarily belongs to written testimony; a witness may happen not to have released, or the examiner may not have put the question properly, the examination taking place in the absence of the counsel and the judge. Thus, in the long train of authorities cited in Sandford *v.* Paul, 2 Dick. 750, a re-examination of a witness has, under particular circumstances, been allowed. It is difficult, too, upon principle, to distinguish this case from those where depositions have been suppressed on account of the interrogatories being leading; that is equally a mistake of the counsel; yet the parties have been allowed to examine the witnesses again. Lord Arundell *v.* Pitt, Perry *v.* Silvester. So, also, in the case of Kirk *v.* Kirk and Milward *v.* Atkins, a re-examination was permitted.

In Banks *v.* Farquharson, before Lord Hardwicke, the defendant offered, at the hearing, to read proof of the hand-writing of a party to a deed; one of the attesting witnesses was dead, the other was in Scotland; but these facts were not in evidence. The proof of the hand-writing was rejected; what was then to be done? According to the argument now used the defendant must have failed, it being by his own neglect that he had not gone into evidence that he must have known to be necessary; Lord Hardwicke, however, put off the cause, and permitted an interrogatory to be exhibited.

The case of Lake *v.* Skinner, relied on upon the other side, I still think was right: but how was it circumstanced? The defendant having set up a modus, adduced no evidence till shortly before the hearing, and then applied for leave to examine a witness *viva voce* to prove the rector's books. The court there said, that as the plaintiff, relying upon there being no evidence on the other side, had gone into no evidence himself; he must have the same liberty of examining witnesses, if it was granted to the defendant. The evidence was to prove the fact of payment of the modus, and would be going into all the merits of the case; the other party could not, therefore, be precluded from doing the same. It was not, however, laid down as an universal rule; it was stated that there might be exceptions.

Now in this case the evidence proposed to be given relates only to the proof of a document. There is no danger that the plaintiff may profit by the publication having passed, or that the defendants may be taken by surprise, for they must have known that this was to be proved; we are not called on to let in any new matter, the defect has not happened from any design, but by a mere slip, and, therefore, though the cause has come to a hearing, I think I should not be doing justice to the plaintiff if I did

not allow a re-examination, to prove the fact of the loss of this instrument. In Milward *v.* Atkins, where there was a similar omission to prove the certificate and release, both which were known to be necessary, this indulgence was granted; why was that done? Because without it there would have been a failure of justice. Why was it done in the case, where a partial release was given instead of a general one? If it was allowed in those instances, I do not see how it can be refused here, when it is confined to a single point not mixed up with the general merits. I have stated my reasons at large, because nothing is more prejudicial than relaxing general rules by exceptions, and I have, therefore, been desirous of grounding myself on authority and principle, and showing that I have not gone a step beyond what has been done before me.

His Honour doth order, that the petitioner, the plaintiff, R. K. C., be at liberty to exhibit an interrogatory in the supplemental cause, before one of the examiners of this court, for the further examination of S. W. W. in the petition named, and also to examine E. D. in the petition named thereon, as to the loss of the indenture of lease in the petition mentioned and the search made for the same, with liberty for the defendants to examine witnesses as to the said loss or the existence of the said deed, and also to cross-examine the said S. W. W. and E. D., or either of them; and it is ordered, that the plaintiff, R. K. C. do pay his own costs and the defendants' costs of such examination and cross-examination by them, in case the same shall take place, and likewise the costs of this application to be taxed, &c.

Reg. Lib. A. 1820, fol. 238.

Gawler *v.* Cadby.

Jacob, 346.

Bequest to testator's daughter and her children, and in default of such issue, and in case of her death, to A. and B. The limitation over takes effect on her dying without children.

Rolls.—Nov. 30, 1821.

J. GAWLER, by his will, gave two leasehold houses to trustees, upon trust to pay and apply the sum of 30*l.* for the benefit of his wife during her life, out of the rents and profits, and the residue for the maintenance and benefit of his daughter Emma Sarah: "and after the death of my wife the whole of the rents, issues, and profits of the said houses and premises shall be the sole property of her my said daughter Emma Sarah and her children lawfully begotten; and in default of such issue, and in case of her death, the said houses and premises shall become the joint property of my sons Felix and William Paul, or the survivor of them."

The testator died in 1815. Felix Gawler and W. P. Gawler, who were his natural sons, died some time before his wife and daughter; administration to their effects was granted (at the nomination of the crown) to the defendants, one of whom was also the surviving trustee under the testator's will. The testator's widow died in 1818; his daughter Emma Sarah died in 1820, without having ever been married, and having by will be-

[Gower v. Cadby.]

queathed all her property to the plaintiffs, who filed the bill, claiming the two leasehold houses as having vested absolutely in her under the will of the testator.

Mr Trower and Mr Phillimore, for the plaintiffs.

The residue being given to the testator's daughter and her children, she would, if it were real, have taken an estate tail; consequently, it being personal property, the absolute interest was vested in her. The limitation over for default of issue is too remote, and the words "in case of her death" must be taken, as in Hockley v. Simmonds, 4 Ves. 161, to refer to the contingency of her dying before the testator, and to prevent a lapse having survived him, there was nothing to confine the effect of the preceding words.

Mr Hayter and Mr Latham, for the defendants, contended that the words "in default of such issue" must be taken in connection with those which follow; namely, "in case of her death;" they refer to the same period, and mean a failure of issue at her death, upon which event the limitation over was to take effect: they cited Wilkinson v. Smith, 7 T. R. 555, and Billings v. Sandom, 1 Bro. C. C. 393.

The Master of the Rolls. The construction of this will would not be a subject of much doubt to those who are not acquainted with the authorities. Every one would say that both the daughter and the two sons being objects of the testator's bounty, though he looked primarily to her, he intended the property to remain for them in the event of her dying without children; and the question is, whether according to the authorities applicable to these words, that intention is properly expressed.

The testator gives the houses to his daughter Sarah and her children lawfully begotten; and it is properly argued that this alone would give her an absolute interest. He then proceeds: "and in default of such issue, and in case of her death," he gives them over. These are words of double contingency—default of issue, and death. Does it not evidently mean if she has without issue? It is argued from authority that the words "in case of her death" must be taken to be those of dying in the testator's lifetime. But the reason of the case alluded to does not apply here. If there is a gift to A. B., and in case of his death to C. D., words applying to contingency being used, with reference to an event as to which none exists, it is supposed that some contingency must be meant, and it is considered to apply to death in the lifetime of the testator. That is because there is no other construction to be put upon it; but where there is an intelligible contingency, it must be looked at. Here, by coupling together the words "in default of such issue," and "in case of her death," it means in case of her dying without issue; and there is a contingency, without resort to the construction contended for.

A limitation in default of issue would in general be too remote, but the courts are disposed to tie it down to a failure of issue at the death. In Wilkinson v. Smith, the words were stronger than here. A term was limited to one and the heirs of his body, and their heirs and assigns for ever, which the court thought would alone have passed an absolute interest. But it was given over "in default of such issue, then after his decease to B." The words were not inserted with these, but are they not fairly to be interpreted as the same in substance? This case would be an authority, if one were wanted; but without it, I think that from the gift

being to the daughter and her children, there is enough to show that the latter words are descriptive of her dying without her having children.

Bill dismissed.
Reg. Lib. A. 1821, fol. 807.

The Bishop of St Asaph *v.* Williams.

Jacob, 349.

A bill for an account of tithes received from the occupiers, by a person claiming under an adverse legal title, will not lie.

Rolls.—December 3, 1821.

THE bill stated that the rectory of the parish of St Asaph was, at some ancient time, appropriated and annexed to the see of St Asaph, and that by virtue of some endowment made by a former bishop of that diocese, the dean of the cathedral church of St Asaph was entitled to a moiety of the tithes of three of the thirteen townships into which the parish was divided, and the prebendary of the stall of Hornwfydd to the other moiety of the tithes of those townships, and to the entirety of those of another township; the prebendary of the stall of Veynol was in like manner entitled to the tithes of three other townships, Veynol, Boddlewidden and Pengwen; and the plaintiffs, the bishop and vicars choral of the cathedral church of St Asaph were entitled to the tithes of the remainder of the parish. The defendant sir John Williams was lessee of the tithes of Veynol, Boddlewidden and Pengwen, under the prebendary of Veynol.

The bill then stated that there was in the county of Flint, a district called the vill or franchise of Rhuddlam, the boundaries of which were well known and ascertained: that part of it which was situate within the parish of St Asaph, formerly consisted of waste lands exposed to the sea, but had, about the year 1807, by inclosures and draining, been rendered productive, and that it was within that part of the parish to the tithes of which the plaintiffs were entitled.

The bill then alleged that the defendant sir J. Williams under some claim or pretence of adverse title, had received and taken the tithes of that part of Rhuddlam which was within the parish of St Asaph, and converted the same to his own use, alleging that it was within the townships, the tithes of which were annexed to the prebend of Veynol. The bill then charged several circumstances tending to negative that position, and prayed an issue, if necessary, to try whether the lands in question formed part of the townships of Veynol, Boddlewidden, or Pengwen: and if it should appear that they did not, then that the defendant sir J. Williams might account for the tithes of those lands received by him.

The defendant sir J. Williams, by his answer, insisted that the lands in question formed part of the townships, the tithes of which were demised to him. The prebendary of Veynol made the same case: the dean of Asaph, and the prebendary of Hornwfydd, who were made defendants, claimed no interest. Witnesses were examined on both sides, and the cause now came on to be heard.

[The Bishop of St Asaph *v.* Williams.]

Mr Benyon and Mr Pepys, for the defendant sir J. Williams, upon the opening of the case, objected that the nature of the suit, as appearing by the bill, was not such as to entitle the plaintiffs to relief in equity, the bill not praying an account of tithes against the occupiers, but an account of money received for the tithes by a person claiming by an adverse title. A question on a legal title to tithes may be determined by ejectment. Priest *v.* Wood, Cro. Car. 301. And therefore a bill in equity to try it is inadmissible. The plaintiffs can have no remedy in equity except as against the occupiers.

Mr Wetherall and Mr Roupell, for the plaintiffs.

The bill states the defendant sir J. Williams to have received from the occupiers the tithes which, as we contend, ought to have been paid to the plaintiffs, and prays an account of them, as of money had and received to the use of the plaintiffs. A bill will lie for this purpose, as well as an action: as in Hawkins *v.* Kelly, 8 Ves. 308, where a rector having leased the tithes, died in the middle of the year, and his successor received from the lessees the rent for the whole year: it was held that the executor of the deceased rector was entitled to an apportionment of the rent, as money had and received to his use, and that he might recover it by action or by bill. Besides, to ascertain the amount received, an account must be taken. Wherever tithes can be sued for at law there is a concurrent remedy in equity. The title depends entirely on a question of locality, as to which the court may entertain a jurisdiction analogous to that which it possesses in cases of confused boundaries. See Ferrers *v.* Pellatt, 4 Gwill. 1602. It also has the advantage of avoiding the multiplicity of suits that might otherwise be necessary against the different occupiers. But if the objection can be sustained, it may be got rid of by amending the bill, and adding some of the occupiers as parties.

The Master of the Rolls. It struck me from the first that the bill was open to considerable objections, but I was desirous of hearing all that could be said in support of it, being reluctant to turn parties round when they come prepared for the decision of an important question of title.

With respect to the last point made, the application for leave to amend by adding parties, there is this decisive answer to it, that the frame of the bill and the relief sought by it cannot be altered, and if the tenants were made parties they could only appear as bystanders: it would still retain the shape of a bill to compel the defendant Williams to refund money stated to have been improperly received by him.

The bill prays an issue, and an account: but the question is one of legal title only: which of two independent persons are entitled to these tithes. It is not a case similar to those in which the court has entertained jurisdiction as to a legal question, where it is necessary to ascertain boundaries; for it is not stated that difficulty arises from any confusion of boundaries; on the contrary, the bill proceeds upon the notion that the lands are perfectly well known. It is necessary, besides, in those cases to show that there has been some privity of title, and that the party who is called on to submit to this jurisdiction has improperly confounded the boundaries. Neither does this bear any similitude to a bill of peace: that is only allowed where various suits render it necessary for the court to interpose, not because there are various claimants.

It is then said that the defendant having received the tithes in question, to

which the plaintiff is entitled, the bill seeks to follow them into his hands, and therefore prays an account. No case, however, has been found, and I am not aware of any where an account has been directed, except against the occupier. Such a bill is unsupported by authority, and I do not think that it can stand upon principle. A bill for tithes is of a peculiar nature; the jurisdiction is only exercised as between the person entitled to receive them and the person bound to render them, making the latter responsible for having withdrawn that which he ought to have set out. The jurisdiction arose from there being originally no common law proceeding to compel payment; but it is confined to persons standing in the situation of being entitled to receive, and being bound to set out the tithes. The occupier may, if he can, protect himself by insisting that another person is entitled.

This, however, is not a bill for tithes, but for money had and received; and then of what consequence is it whether it was received on account of tithes, or on account of rents, or of any thing else? It is no longer within the peculiar law that relates to tithes; and the question is, whether it can be sustained as a bill generally for money had and received? Now in some cases such a bill may perhaps lie; but where one has been in possession of land and has received the rents, another cannot file a bill for an account of them, where the question who is entitled to the money depends upon the question who is entitled to the land. That this originates in tithes makes no difference; it is as much the subject of legal jurisdiction as land, and the account must depend upon the legal title. This is not a case where there would be any difficulty in trying the question at law, it being settled since the case in Cro. Car. that ejectment may be brought for tithes; and though it is said that that would not determine the title as against all the claimants, yet that is the case with every ejectment. I am, therefore, of opinion that this court has no jurisdiction in a suit for money had and received upon a legal title. I find no instance of such a bill, and I am unwilling to adventure on a new proceeding not bottomed on any sound principle.

Bill dismissed with costs.
Reg. Lib. A. 1821, fol. 233.

Hamley *v.* Gilbert.

Jacob, 354.

Direction for payment of residue to E. G. H. to be applied by her, at her discretion, for or towards the education of her son, and that she should not be liable to account to him or any other person for the disposal or application of it. The residue being considerable: Held, that E. G. H. was entitled to it, subject to the application of so much as the court might think fit to the education of the son during his minority.

Rolls.—December 2, 3, 4, 1821.

LUCRETIA POMEROY, by her will, dated in 1816, gave her real and personal estate to her executors, upon trust to convert it into money, and after payment of her debts, funeral, and testamentary expenses and

legacies, upon trust to pay over the residue of such moneys to her niece Elizabeth Garnett Hamley, to be by her applied to the purposes thereinafter mentioned. And after giving pecuniary legacies to several persons, some of whom were her next of kin, she declared her will to be, that the residue of the moneys arising from the estate and effects thereinbefore directed to be paid to the said Elizabeth Garnett Hamley, should be laid out and expended by her, at her discretion, for or towards the education of her son Francis Gilbert Hamley, her godson, and that she should not at any time thereafter be liable and subject to account to her said son or to any other person whatever, for the disposal or application of such residue or any part thereof. The testatrix by some codicils gave several pecuniary legacies, and amongst them a legacy of 200*l.* to Elizabeth Garnett Hamley. She died in January 1821; Francis Gilbert Hamley was an infant.

The bill was filed by Elizabeth Garnett Hamley and her husband, claiming to be entitled to the residue of the testatrix's estate, subject only to the application of such part as she in her discretion should think fit for her son. The defendants were the executors, one of whom was the testatrix's heir at law, and one of her next of kin, and also a legatee of 100*l.*, and Francis Gilbert Hamley, the infant. Pursuant to the decree made at the hearing, the accounts of the testatrix's estate had been taken; the value of the residue appeared to be about 8000*l.* The cause now came on for further directions.

Mr Wetherall and Mr Merivale, for the plaintiffs, contended, that Elizabeth G. Hamley was entitled to the residue, subject only to a direction to maintain and educate her son, which the testatrix had left to her discretion, purposely providing that it should not be an imperative trust, by making her unaccountable. It is an intimation of the testatrix's wish, as distinguished from an obligation. The uncertainty excludes it from being considered as a trust. Bland *v.* Lamb, Prec. in Ch. 201, n., ed. Finch; Le Maitre *v.* Bannister, Prec. in Ch. 201, n., ed. Finch. When a legacy is given to a father for the benefit of himself and his children, it is paid over to him. Cooper *v.* Thornton, 3 Bro. C. C. 96, 186; Robinson *v.* Tickell, 8 Ves. 142. Upon the same rule the property should in this case be handed over to the mother, and when in her possession, as she is not liable to account, it becomes her own. They also cited Hammond *v.* Neame, 1 Swanst. 35.

Mr Roupell, for the infant defendant, F. G. Hamley.

The residue is directed to be paid into the hands of the mother, with an express trust, importing that she is to apply the whole to his education. This is, in fact, a gift of the whole to him: he is the only object of bounty, the only person whom the testatrix expresses a design of benefiting with this fund; nothing was intended for the mother; she has a legacy by the codicil, which is inconsistent with her taking the residue. This vests the property in him, and the testatrix having pointed out the mode in which it is to be applied for his use, does not divest it. Even if it were impossible to apply it in the mode pointed out, it would still belong to him, as in Nevill *v.* Nevill, 2 Vern. 431, and Barlow *v.* Grant, 1 Vern. 255, where legacies for apprentice fees for boys were held to belong to them absolutely, though from their death or from their not being old enough, the sums could not be applied to the specified purpose. Barton *v.* Cooke, 5 Ves. 461, is to the same effect: and upon this principle the infant is entitled to the residue, and to have it applied for his education, or for such other purposes as

may be most beneficial for him. But even if it could not be applied to other purposes, the whole may be devoted to his education, which is not limited to his minority, but will include his residence at a university, travelling, and preparation for a profession, and it is impossible to define how much these objects may require. The direction that the mother shall not be accountable, cannot exempt her from the performance of an express trust, though it may prevent inquiry as to the mode in which she may apply it.

Mr Wingfield, for the heir at law and next of kin, contended, that there was an intestacy as to so much as in the opinion of the court should not be required for the education of the infant.

The Master of the Rolls. This is a case of considerable difficulty; the court is left to form the best conjecture that it can, in the absence of any express direction. Several constructions have been proposed. On the part of the testatrix's niece Elizabeth, it is said that she is entitled for her own benefit, either absolutely or clothed with a trust to a certain extent, for the education of the infant. The next claimant is the infant; on his behalf it is contended, that as it is not certain how far the purpose of education may go, as it admits of various degrees of expenditure, and may at different periods require the whole of the interest and of the corpus, he is entitled to the whole fund. The next of kin and the heir at law contend that there is an intestacy as to part. It is much more easy to negative any one of these claims, than to say which of them ought to prevail. Thus with respect to the heir at law and next of kin, there is a gift of the residue, which is evidence against an intestacy; there are also indications of limited bounty to the heir at law and most of the next of kin.

Supposing them to be out of the question; let us consider the case as between the testatrix's niece and her son. Several cases have been cited in support of the claim of the son. In Nevill *v.* Nevill, 2 Vern. 431, 500*l.* was given to the eldest son of J. N. to place him out an apprentice, and a son being born after the testator's death, it was decreed to be paid to him, though it was objected that he was not entitled until fit to be placed out. In Barlow *v.* Grant, 1 Vern. 255, a smaller sum being given for the same purpose, and the infant having died, it was decreed to be paid to his executor or administrator. The difference is that there the testator evidently intended a bounty to a certain extent for the infant, and though the mode of application directed failed, yet still the sum was devoted to him, the court not considering the particular purpose as the substance of the gift. There the child must have the money, or it would have nothing. Here, however, it will enjoy the benefit of the education, but it is difficult to suppose that that can exhaust the whole bequest; for we are not to waste the fund, we are not to look out for modes of spending it, because it is considerable. The dividends will be sufficient to provide for all that the confined purpose of the testatrix requires.

In Barton *v.* Cooke, 5 Ves. 461, a legacy was given for the board and education of an infant, and a further sum as an apprentice fee for him; having attained nineteen without the sums being applied to his use, he was held entitled to receive them. Rather than the purpose should fail altogether he was allowed to take. But to make these cases applicable it should have been decided, that when the infant did have the benefit intended for him, that he was also to take what was not required for the specified purpose. He is an object of bounty; but only in a particular

mode; and the question is, whether he is entitled to any thing *ultra* the particular purpose. If money be given to pay his schooling expenses, it would entitle him to that, but would not raise any implication in his favour beyond. If 10,000*l.* were given to purchase him a commission in the army, it would be more than could be applied to that purpose. He would be entitled to a commission, but not to any thing further. How is an inference to be raised that he is to have more.

There is another class of cases in favour of the person to whom the fund is given in the first instance. In Andrews *v.* Partington, 3 Bro. C. C. 60; 2 Cox, 223, there being a direction to apply the interest of legacies given to the testator's grandchildren for their maintenance, it was held that no allowance was to be made to their father, if he was himself able to maintain them. It has not been considered what would be the effect here, if the father had an ample fortune sufficient to provide fully for the infant: could he then be maintained out of this fund? According to Andrews *v.* Partington a property expressly appropriated for maintenance is not to be so applied, if the father be of sufficient ability, when it would be to the prejudice of the child; it would be a different question where the fund is appropriated to the maintenance and education of the child in such a manner that it cannot be broken in upon for any other purpose. But in that case lord Thurlow says: "if the will had given the dividends to the father for the maintenance of the children, it would have amounted to a legacy of the dividends to the father, which he would have been entitled to, though he had not spent half of it in the children's maintenance." 2 Cox, 224. The father would be entitled to the whole, though the purpose might not exhaust it, and though the argument in favour of a resulting trust would equally apply.

The case of Hammond *v.* Neame, 1 Swanst. 35, is certainly entitled to much less authority. There the interest of a sum of money was to be paid to the testator's niece for the maintenance of her children: the sum was to be paid to them at twenty-one, and was given over in default of issue at the niece's death. She had no children, and the question was, whether she was to take the interest beneficially; many of the arguments used here would have been applied there to reduce her to a mere trustee; but the court thought that as it was to be paid into her hands, and as the children were to take only through the medium of their mother, that she was to receive the interest.

I think that several of the other cases do not apply to this; for they were cases of a direct express gift, and the question was, whether that was cut down by the trust or recommendation as to the mode of application. Here there are no words of absolute gift; it is directed to be paid over to the niece. I should observe, that I do not find in the will any other gift to this niece; if she was to be a mere trustee, she would be almost the only relation not benefited by the will. The testatrix then declares, that the property directed to be paid over to her is to be laid out at her discretion in the education of her son, and that she is not to be liable to account for it. And the question is, whether this converts her into a mere trustee. I cannot think that it was so intended; the whole is to be paid into her hands; but it cannot be supposed to be mandatory on her to lay out the whole upon her son's education; a discretion is left her as to the quantum, and it must have occurred to the testatrix that there would be the corpus to be disposed of. When it is paid over to her, and she is not to account for it, it does appear to be a gift without responsibility.

What is a gift but handing over a fund with an absolute power of disposition? If it be given to you, and you may dispose of it as you please, is it not yours? It is not for her application of it to the purpose of education only that she is exempted from account; for that account could only be called for by her son; but she is not to account to any one.

If we could connect this with any clearly defined trust, the court would say, that although she was not to be strictly accountable for every shilling, yet that it must be *bonâ fide* applied to the object specified. But here the purpose declared by the testatrix is limited; and for what remains beyond that, she is not to account. I do not say that the result is quite satisfactory; but looking at the whole of the will, considering the provisions in it, and that there are positive words giving her the residue, and excluding account, the best judgment I can form is, that the surplus was intended for her.

It has been asked, how the legacy given to the niece in the codicil is to be explained? and certainly it is a fair observation, that there is a contrast in that respect between the will and codicil; but it is to be remembered, that the legacies would be paid in preference to the residue; and it was not unnatural that the testatrix should therefore provide a certain sum for her.

This is the best view I can take of the case, looking at the whole of the will; at the provisions made for others of the family; at the whole residue being given to the niece; at the circumstance that nothing else is given to her by the will, and at the direction that she shall not be liable to account. The consequence is, that there must be a declaration that she is entitled, subject to a trust to apply a part to the education of her son: he must be properly and liberally educated, and so much as the Master may think proper must be set apart for that purpose; his education, however, must terminate with his minority; it cannot go on for ever: and it cannot extend to giving any auxiliary benefits in the future course of his life(*a*).

His Honour doth declare, that the said plaintiff, E. G. H. is entitled to the clear residue of the real and personal estate of the said testatrix, L. P., subject to a sufficient fund being set apart for the education of the defendant, F. G. H., the infant, during his minority, and doth order that it be

(*a*) The statement of the following case is taken from the printed appeal papers.

Thurston *v.* Essington, Dom. Proc. 27th February 1727.—J. Thurston, by his will, gave some real estates to his sons in fee, and 2000*l.* to his daughter; and then gave his money and securities for money to be laid out in houses and lands by his wife (whom he appointed his executrix), and to be settled upon his two sons, and proceeded thus—"Item, my will and meaning is, my wife shall receive the rents and profits of all my estate until my children attain the age of twenty-one, and to maintain my children as she thinks convenient, and when they do come of age, she shall not be liable to give them any account of the rents and profits by her received all that time." The interest on the securities, received by the widow during the minority of the sons, amounted to about 4000*l.*, and a bill was filed by them for an account of it. On their behalf, it was insisted that the above clause could only be construed to extend to the rents and profits of the real estate, which were about 700*l.* per annum, and more than sufficient for the maintenance of the sons, and that all the money, without distinction of principal and interest, was directed to be laid out in lands for the benefit of the sons, and that the mother was otherwise amply provided for. At the hearing, on the 21st of June 1721, Lord Macclesfield dismissed the bill, with costs, declaring that the interest money was, by the will, given to the mother and not to the sons. On appeal to the house of lords this decree was affirmed.—Lord's Journals, vol. xxiii, p. 197.

[Hamley *v.* Gilbert.]

referred to the Master, M. A., to inquire and state to the court what will be a sufficient sum to be appropriated for the purpose of securing to the defendant, F. G. H., the benefit of education during his minority.

Reg. Lib. A. 1821, fo. 618.

Hooper *v.* Goodwin.

Jacob, 375.

Bequest after the death of certain annuitants of a sum set apart by the court for payment of them, or of such part of it as should not, by reason of their deaths, have been assigned or transferred: Held, that a sum which had been ordered to be transferred on the death of an annuitant, but had not been actually transferred, did not pass.

Rolls.—Dec. 20, 1821.

SUSANNAH ANN GOODWIN by a codicil to her will, dated in December 1819, after reciting that she was entitled, upon the decease of certain annuitants named in the will of her late father, to a sum of 10,500*l.* 3 per cent consolidated bank annuities, or thereabouts, being a fourth part, or her share or proportion, of certain 3 per cent consolidated bank annuities, set apart under the orders of the court of chancery, in a cause of Hooper *v.* Goodwin for the payment of such annuitants, gave to the petitioner the said sum of 10,500*l.*, or other her fourth part, share, or proportion, of and in the 3 per cent consolidated bank annuities so set apart as aforesaid, or such part thereof as should not, by reason of the death of any of the said annuitants, have been assigned or transferred unto her (the said testatrix's) name in her lifetime.

By an order made on the 21st of April 1820, upon the death of one of the annuitants, the sum of 166*l.* 13*s.* 4*d.* consols (being a fourth part of the sum appropriated to answer his annuity) was ordered to be transferred to the testatrix. She died before it was actually transferred. The present petition prayed (inter alia) a transfer of this sum of 166*l.* 13*s.* 4*d.* consols to the petitioner.

Mr Farrer, for the petitioner.
Mr Tinney, on the other side.

The Master of the Rolls. The testatrix having first given the 10,500*l.* stock, describing it, qualifies it by saying, "or such part thereof, &c." The question is, whether the event has taken place which was to cut down the gift. I am disposed to think that this sum is not included; it had virtually altered its form; it had ceased to be reversionary, and had become immediately disposable by her. It was no longer set apart for the payment of the annuitants. The bequest is of such part as should not by reason of the death of the annuitants have been assigned or transferred to her. This looks to the death of the annuitants as the event that was to make the difference. She meant evidently to give so much of it as she could not touch; but when it came into possession, it was to cease to be the fund for the legatee. The order of the court prior to her death had directed it to be transferred: was not that "assigning" within the mean-

ing of the will? It belonged to her, and was assigned and directed to be paid to her. On the whole, I think the petitioner is not entitled to the sum in question.

Wartnaby *v.* Wartnaby.

Jacob, 377.

A bill may be taken off the file, if filed in the name of a plaintiff who is in a state of mental incapacity. *Semble.*

A suit being properly instituted, the proceedings not to be stayed on the ground of the plaintiff's subsequently becoming imbecile.

Dec. 19, 20, 1821.

A MOTION was made on the part of the defendant to take the bill off the file, upon the ground of the plaintiff's having been for some time reduced by age and infirmity to a state of mental imbecillity, which rendered her incapable of giving authority for the institution of the suit. Several affidavits were filed on both sides with reference to the state of her mind, and to the circumstances of the suit. It appeared that the bill was filed in May 1820, for an account of various transactions, in which the defendant, and plaintiff's son, had acted as her agent with respect to her property. He had put in his answer, and also filed a cross bill. An answer to the cross bill was prepared for her; but upon the commissioners attending her to swear her to it, they declined taking it, thinking her not in a condition to have an oath administered. She shortly afterwards came to the neighbourhood of London, and one of the Masters attended her for the purpose of taking the answer, but he declined for the same reason. On the other hand, several persons spoke to her sanity at the time of the commencement of the suit, and subsequently; and some written authorities for proceeding in her name, signed by her, were produced.

Mr Hart and Mr Heald and Mr Simpkinson, in support of the motion.
The Attorney-General and Mr Horne and Mr Roots, against it.

The Lord Chancellor. This is a motion now made to take off the file this bill which was filed in May 1820, and it is founded upon this proposition, that the bill is not the bill of the plaintiff, but that somebody is using her name in it, without her authority, she not being, as it is said, in a state of mind competent to give such authority. There have been often motions for taking bills off the file; sometimes the plaintiff has made an application for that purpose, on the ground of his not having sanctioned the suit. The court has in such cases sometimes granted the application, and sometimes refused it, making the solicitor indemnify the plaintiff. I do not remember any instance of a motion of this kind by the defendant, but certainly there may be cases of such abuse as the court would attend to; as a short time ago, when it was suggested that a bill had been filed in the name of a dead man. And so if the mind of a person was gone, so that she could not as a matter of choice authorize the suit, it might be considered in the same way as if she was actually dead. It is said here

that some persons have instigated the plaintiff to commence this suit against her wishes. But the court cannot stop the proceeding on that ground, if she had judgment enough to determine whether she should give way to that instigation, much less, if the proceeding be a proper one with a view to her rights and interests; and it is impossible to say that this bill was one that was improper to be recommended.

His lordship then went through the different facts appearing on the affidavits; remarking upon the circumstances of the defendant having answered the bill, his having written letters to the plaintiff, and having filed a cross bill for discovery, as proving that he did not then consider her incompetent. He cannot say that she had not judgment to understand the letters which he addressed to her. His act in filing the cross bill showed that he thought he was dealing with a person that could give useful discovery. The motion rests on the ground of her being incompetent now; and certainly what was done with respect to taking her answer excites considerable suspicion, which it is now attempted to throw back to May 1820, and from it to raise an inference that she was then incompetent, notwithstanding these intermediate proceedings.

Then this question arises: Is the suit to proceed, supposing her to be thus incompetent now? and I think it is difficult to say, that if the suit be proper, and the further prosecution of it be proper, and her state of mind be such that she cannot revoke the authority previously given, that upon that ground the court would stay the proceedings. But to take the bill off the file, and make the answer waste paper, would be quite a different thing. I cannot make this order, nor substitute any other for it: but let the parties at the next seal inform me what they will do as to referring the matters in difference. I must say, that at the institution of the suit nothing appears to me to have been done that ought not to have been done. I cannot say the same with respect to taking the answer.

It was understood that a reference was afterwards agreed to.

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Jacob, 381.

Devise to a college for founding additional fellowships and scholarships, under regulations by which certain stipends were to be paid to the new members out of the rents, and the testatrix hoped that a surplusage would remain for the benefit of the college, which was to be thrown into the common stock of the college, and improved as a fund for the repairs of the college in general, discharging debts, building, buying books, or other such public uses within the college. The rents having increased considerably, held, that the surplus not required for repairing, building, &c. belonged to the old foundation.

Devise of an estate for charitable purposes, with a direction that the rents should not be raised: Held, that this direction was void, and that there was no resulting trust for the heir at law as to the increased rents.

A college is not bound to accept an accession to its foundation.

The visitor of a college becomes visitor of a new foundation. *Semble.*

Whether a college can accept an accession to its foundation without the consent of the visitor. *Qu.*

Feb. 8, 9, 11, 12, 1820.

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MARY RAMSDEN, widow, by her will dated 3d November 1743, gave all her estates, both real and personal, to trustees, upon trust, and for the several uses therein mentioned; and after certain bequests and directions, devised as follows: "and my will is, that when the annuitants hereinafter mentioned are dead, and all other things appointed by my executors to do are performed, and also a site of ground purchased or procured for erecting a building for the reception of six fellows and ten scholars in the college or hall of St Catherine the Virgin, in the university of Cambridge, that then my trustees do well and truly convey all the real estates above mentioned, and all the personal estate, to the master and fellows of the college or hall of St Catherine the Virgin, in the university of Cambridge, for ever, for the uses and purposes hereinafter mentioned, viz. for erecting the buildings aforesaid, and for the maintenance of six fellows and ten scholars in the said college or hall, and for other uses, in such manner and under such directions as are contained in a writing hereunto annexed under my hand and seal, intituled 'Rules and Orders touching the Benefaction of Mrs Mary Ramsden to Catherine Hall, in Cambridge,' which writing, consisting of ten half-sheets of paper, and thirty-three sections or paragraphs, I do make a part of this my said will. I do appoint and order that the buildings on my estate be kept in good repair, that the rents continue the same as at the time of my decease, and that leases be not made for a longer term than eleven years."

The paper referred to by the will contained several rules for the government of the foundation: the first and second related to the buildings to be erected for the reception of the new fellows and scholars. By the third rule it was directed, that when the building should be completed and be fit to be inhabited, and the whole expense of it cleared, then the annual rents and profits were to stand for ever appropriated for the uses and purposes thereinafter mentioned, and principally for the founding and maintaining six fellowships and ten scholarships in the said hall or college, to be called by the name of the Skirne fellowships and scholarships. The next eight rules related to the qualifications and the elections of fellows. By the ninth rule the first election was to be by the master and fellows of Catherine Hall, the Vice-Chancellor of the university having a casting vote. In the subsequent elections the fellows of the new foundation were, by the eleventh rule, to join and have equal votes, and they were to attend the examinations preceding the elections. By the twelfth rule, the testatrix appointed that for the maintenance of the fellows they should have clear 52*l.* a year, besides their lodgings rent free. The fellows of this foundation were in all things not therein specially directed otherwise, to be subject to all the rules, orders, statutes, and discipline of the college; they were to be obliged in their turns to perform all college and university exercises; to stand to all commons in the hall, and all other college dues, as the then fellows did. By the thirteenth rule, the fellows were to reside in the college six months in the year; or if they resided for a less time they were to forfeit 16*s.* 8*d.* a week, "to be applied as hereinafter directed to the common stock of the college." By the fourteenth rule, the profits during the vacancy of a fellowship were to be "laid aside as above mentioned for the common stock of the college, to be applied as hereinafter directed."

By the seventeenth rule, in all elections of scholars after the first (in which the masters and fellows of Catherine Hall only were to be the electors), the fellows of this foundation were to be joined with them, and have

equal votes. By the nineteenth, the stipends of the scholars were to be 15*l.* a year, besides their chambers rent free; they were to be subject in all things to the master and fellows, and to the discipline of the college, in the same manner as the then scholars. By the twenty-second rule, they were, also, in case of non-residence, to forfeit 5*s.* per week, which was to go to the common stock. The twenty-seventh rule was as follows:

"The rents of the estates given in support of this benefaction, I think, now stand at a reasonable rate, at which I hope they may be always kept; and as I desire the tenants may always have good and beneficial bargains, I would have no attempts, if possible, made to raise them. As they now stand, I hope, after all deductions on account of taxes and repairs, and charges of management, the payment of the fellows and scholars, and the other small payments charged in the last article, there will still a surplusage remain from the rents and profits of the estates for the benefit of the college; which, together with the forfeitures that shall accrue from the absence and vacancies of the fellowships and scholarships, I would have thrown into the common stock of the college, and improved if it may be as a fund for the repairs of the college in general, as well the old as the new buildings, or the discharge of any debt that may now lie on the old college on account of the buildings already erected, or the making any additional buildings, or buying of books for the library, or other such public uses within the said college; but, first, after all the necessary outgoings for taxes, repairs and management, I would have the fellows and scholars paid before any other disbursements whatever. And if the rents of the estates prove at any time not sufficient to pay the same, I would have the forfeitures for absences and vacancies brought in aid, and pay the whole which is appointed to be distributed before any thing be laid aside for the common stock of the college."

The next rule directed the estates always to be let out as near as might be at the then rents, no lease to be longer than eleven years, and no fines to be taken. By the twenty-ninth rule, the estates were to be visited every five years by the bursar and one of the fellows of the foundation, and the expenses of the journeys paid out of the rents: the accounts of this foundation were to be annually audited, the audit to be immediately after the common college audit, and the fellows of this foundation to be present and assist therein. The thirty-second rule was as follows: "and whereas I have been informed likewise that there are some of the fellows of this college, of bye foundations, who are called fellows, though they have no power or privileges as such, for the avoiding all mistakes in the construction of these orders and rules, wherever the master and fellows of the college are mentioned, I would always have it understood to be meant of the master and fellows of the old foundation." The whole concluded in the following terms: "great care having been taken to make these rules and orders explicit and precise, so that it is hoped they cannot easily be mistaken, I therefore appoint no visitor of this foundation; but if any errors or mistakes have been committed, or complaint shall hereafter arise touching the execution of any of these orders or statutes, for the rectifying the same, I do direct that application be always made to the Lord High Chancellor or Lord Keeper of the Great Seal of Great Britain, that the same may be heard by way of petition or such other summary manner as his lordship in his wisdom shall appoint, and by him to be finally determined."

The testatrix died in 1745; some proceedings in chancery were afterwards had relative to her property, in the course of which the will and

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the schedule of rules were established by a decree made on the 9th of December 1752; and in the year 1767, the estates devised by the testatrix were, pursuant to the decree, conveyed by the surviving trustee to the master and fellows of Catherine Hall, in trust for the said master and fellows, according to the true intent and meaning of the will of the said Mary Ramsden, and the rules and orders thereto annexed.

The gross annual rents of the estates, which at the death of the testatrix amounted to 674*l.*, had since increased to nearly 2000*l.*; some sums had also been received from the sale of timber. The surplus rents, after payment of the stipends to the fellows and scholars of Mrs Ramsden's foundation, and the other charges made by her, were thrown into the common stock of the college, or, as it was usually called, the college stock, a fund which also comprised part of the rents of the fellowship estates, and other revenues of the old foundation, chamber rents, sundry payments by members of the college, payments on admissions, and degrees, compositions, and vacant fellowships and scholarships. This fund was under the exclusive control of the master and fellows of the old foundation. By several college orders, the stipends of the Skirne fellows and scholars had been increased: the last increase was in 1807, when an order was made under which each of the Skirne fellows received 68*l.* per annum, and each of the scholars 20*l.* per annum, out of the college stock, in addition to the stipends given by the will. Additions had also been made out of the same fund to the stipends of the master and fellows of the old foundation, and various other expenses of the college were defrayed out of it; some parts of it had at different times been laid out in buildings, inclosures and other improvements, and in the purchase of land.

It appeared that, between the years 1786 and 1790, several sums of money, part of the college stock, had been invested in the three per cent consolidated annuities; and by a college order made in 1791, the sums thus purchased, together with the accumulations and additions that might be made to them, were to be denominated the patronage fund, and to be employed in improving and augmenting the ecclesiastical patronage of the old foundation of the college, by paying annuities of 120*l.* and 150*l.* respectively to the future incumbents of two college livings of small value; and after that purpose should be answered, in purchasing ecclesiastical preferment for the benefit of the Skirne fellows. No additions were afterwards made to the patronage fund, but it received considerable increase by being suffered to accumulate.

On the 24th of May 1805, an order was made by the Lord Chancellor as visitor of the college, in right of his majesty, upon the petition of the master of the college, giving liberty to propose a plan for the raising and application of the patronage fund. Pursuant to this order, a plan was laid before one of the masters of the court, and approved by him, so far as related to the allotting two annuities of 120*l.* and 150*l.*, in augmentation of the two livings mentioned above. It did not appear that this plan, after receiving the approbation of the master, was submitted to the Lord Chancellor. In 1816, one of the two livings in question becoming vacant, one of the fellows of the old foundation was presented, and petitioned the Lord Chancellor, as visitor, that the annuity of 150*l.* might be paid him out of the interest of the patronage fund, which then amounted to 12,802*l.* three per cent consols. By the affidavit in support of the petition, containing a statement of accounts, it appeared that 2712*l.* 7*s.* 4*d.* consols, part of this fund, had arisen from the revenues and estates of the old

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foundation ; and by the order made on hearing the petition on the 13th of August 1816, the Lord Chancellor, as visitor, signified his assent, that the master and fellows should be at liberty, if they thought fit, to apply the sum of 2712*l.* 7*s.* 4*d.* consols, in augmentation of the living, but without prejudice to any claim they might have to the remaining part of the fund as having arisen from the revenues and estates of the old foundation or otherwise.

The present suit was commenced in June 1817, by an information and bill by five of the fellows of Mrs Ramsden's foundation, against the master and fellows of the college, and the heir at law of the foundress ; the scholars, and one of the fellows who declined to join, were also made defendants. It prayed that the accounts of the property comprised in Mrs Ramsden's benefaction might be taken, that the fellows and scholars of her foundation might be declared to be its primary objects, that their stipends might be increased, and that a scheme might be approved of for the disposition of the surplus rents and accumulations, and that the stipends, if increased, might be paid or allowed to the plaintiffs from the time of their respectively becoming fellows. The master and fellows by their answer insisted, that the management of the common stock, including the surplus rents of Mrs Ramsden's estates, was vested in them ; that it was the intention of the testatrix materially to benefit the old foundation ; and they submitted that the stipends of the Skirne fellows and scholars ought not to receive any further increase.

Mr Hart, Mr Heald and Mr Pemberton, for the relators, and Mr Shadwell, for the defendants in the same interest.

The increased value of the estates has produced a considerable surplus income, which was not anticipated by the testatrix. Her will expresses a wish that the rents, being then fixed at a reasonable rate, might remain unaltered, but that wish cannot, under present circumstances, prevent the devisees from letting the estates according to the improved values. As the whole property is given to charity, the heir at law is excluded from this surplus ; and the question is, to what purposes of charity it is to be applied. Not being in the contemplation of the testatrix, the directions in her will and in the rules do not reach it ; it is not expressly disposed of, and it ought therefore to be applied *cypres*. Now the object of the testatrix was *principally* to benefit the new foundation, and the surplus should therefore be applied in furtherance of that object. There is no intention expressed of giving any thing exclusively for the benefit of the old foundation. The surplus which might exist at the time, she gives for the benefit of the college, and desires that it may form part of the common stock ; but the directions which follow, show that she means the college consisting of both the foundations ; for the specified purposes to which it is to be applied are for the benefit of both, and the other public uses to which it may be applied, must be understood to mean uses of the same nature as those specified before, in the benefit of which the whole college would participate. The common stock which she speaks of, means a fund to be used for the benefit of both foundations. If, therefore, the court should be of opinion, that the surplus which has now arisen, ought to be applied to purposes analogous to those to whom the testatrix has devoted the then surplus, it would follow that the new foundation is entitled to share it equally with the old. They referred to the following cases : Thetford School case, 8 Co. 130, Duke 71 ; Attorney-General *v.* Mayor

of Coventry, 2 Vern. 397, 7 Bro. Parl. Cas. 235, edit. Toml., Colles Parl. Cas. 280, 3 Madd. 353 ; Attorney-General *v.* Arnold, Show. Parl. Cas. 22 ; Attorney-General *v.* Sparks, Ambl. 101 ; Attorney-General *v.* Winchelsea, 3 Bro. C. C. 373 ; Attorney-General *v.* Mayor of Bristol, 3 Madd. 319, 2 Jac. & Walk. 294.

Mr Duckworth, for the heir at law.

Mr Wetherall and Mr Matthews, for the master and fellows of the old foundation.

The design of the testatrix was to give the surplus absolutely to the old foundation. Colleges not being bound to adopt accessions to their foundations, some advantage is usually proffered to them, to induce them to allow a new foundation to be ingrafted on their establishments, and in this case the benefit given to the old college, is the surplus which might remain after defraying the expences of the new fellowships and scholarships. The testatrix hopes that a surplusage will remain for the benefit of the college, and the 32d rule shows that she is here speaking of the old college ; she then directs it to be thrown into the common stock of the college, a fund which was then in existence, and which belonged to the old foundation. The surplus is therefore expressly given to them, without any control on the part of the Skirne fellows ; subject only to the duty of repairing, building, &c. The amount to which the surplus has attained cannot vary the question. If the case were before a visitor, he might perhaps think himself justified in entering into other considerations, which cannot be attended to by the court. But the question upon this information is, whether the new foundation has a legal right to the surplus. The decision must depend on the legal construction of the will and rules, by which it is given to the master and fellows, without any liability to account for the application of it ; and they have acted with great liberality in giving the additional stipends to the new members of the college.

February 12.—The Lord Chancellor(*a*). It appears to me, that in any way of stating this case, the relief prayed for is much more extensive than in any case of the kind that has ever been brought before the court; but that furnishes no objection, for in a charity case, if relief ought to be given, it may be given whatever be the form in which it is applied for. I have looked at the case of Attorney-General *v.* The Corporation of Bristol, but it does not apply to the present case, except in this particular, that the Vice-Chancellor decided that case on the intent and meaning of the founder of the charity; and the single question in that case is, as in every case of that nature, whether the Vice-Chancellor has rightly discovered what was the true intention of the founder.

The true question here is, what did Mrs Ramsden, in point of law, by the instrument which is called her will, declare her intention to be, with respect to any possible surplus that might arise out of the rents and profits of her estate. It is, therefore, unnecessary to go into many of those points of doctrine which were stated at the bar; but I take it to be quite clear, that no college is bound to accept an accession to its foundation; on the other hand, it is equally clear, that if a college does accept an accession, it must accept it according to the terms proposed by the donor, unless in the acceptance it makes a new bargain for other modifications. That a college

(*a*) The judgment ex relatione.

is not bound to accept an accession was fully settled in the case of Trinity Hall, Cambridge(*a*). Though in that case it was thought by many that Trinity Hall, which had been dealing for many years with the funds which were given to it in support of the new accession, had accepted it, the court decided that it had not; but the court did not mean to vary the rule, that if a college had accepted an accession, it would be bound by such acceptance.

Mr Wetherall has taken a distinction between the power of the Lord Chancellor sitting in curiâ and a visitor sitting in cameră. I do not enter into that distinction, for I am not now called on to determine what a visitor may do. It is enough to say, with respect to that question, as lord Mansfield said in the case of the Bishop of Lincoln(*b*), that the court of king's bench will grant a mandamus to a visitor commanding him to hear the complaint alleged; but that if the visitor decides wrong, the court cannot alter his decision.

But I am not here acting as visitor; because, on looking at the last clause of Mrs Ramsden's will, I find she says that she will appoint no visitor. I agree, that if there had not been these negative words, it might have been contended that I am the visitor; but she having thus expressed herself, it seems to me that it was her intention that the Lord Chancellor should not be visitor, but that under his judicial authority he should take jurisdiction to hear any dispute by petition or otherwise in a summary way—a jurisdiction which the Lord Chancellor has not. I think, therefore, it is impossible that I can be considered as visitor in this case; and I likewise think, that sitting in a judicial capacity, I cannot be prescribed to by any individual as to the course to be pursued with respect to any proceedings in this court. The testatrix had not power to give the jurisdiction which she has attempted to give.

The question which I have to decide is this, what was the true intent and meaning of Mrs Ramsden in making this will? and this question must be decided on general principles. This case is very important with regard to other collegiate institutions; I do not know much about the colleges at Cambridge, but I know that at Oxford there are some colleges in which accessions have been made to the old foundations of such a nature, that the new fellows are made part of the original body, and are entitled to the same allowances, the same rights of electing, and to all the other privileges of the old foundation. There are other colleges which are formed of old and new foundations, having different estates, in which the fellows of the new foundations are not entitled to the privileges of the old, but in which the founder has left the rents and profits of his estates to be equally divided among them both; or where, from usage, or from what may be evidence of the terms on which the new foundations were accepted, the rents and profits are equally divided. There are likewise other colleges at Oxford to which estates have been given to pay sums of money to support fellows who are maintained in this way out of the estates, and the surplus has been enjoyed according to usage for a long course of years, which may be taken as evidence of the terms on which they were accepted. There are cases in which such distribution has existed for centuries; and I am sure you could not introduce a new rule into the universities with respect to the application of their funds, without causing considerable confusion and dis-

(*a*) The Attorney-General *v.* Andrew, 3 Ves. 633.

(*b*) Rex *v.* Bishop of Lincoln, Trin. 25 G. 3., cited 2 T. R. 338, n.

tress, and such consequences make it the imperative duty of the court, before it does so, to be quite sure that the usage is contrary to the intention of the founders, and that that intention requires the usage to be interrupted. The court ought to be sure that such was the intention of the testatrix, before it lays down any rule respecting the application of the fund in this case; but if the court sees clearly that it was her intention, that the surplus arising out of the rents and profits of her estate, after all the uses which she had specified had been executed, should be divided equally among the fellows and scholars of both the old and new foundation, or should be applied exclusively for the benefit of her own foundation; I say, if the court is perfectly sure that such was her intention, it is bound to order such application.

Now, let us look at this case: in 1743 this lady makes her will. The Lord Chancellor here read the material parts of the will, observing that there was no part of it specifying who she meant by the master and fellows of the college: but in the 32d of the rules and regulations which she has made part of her will, there is her exposition of these terms, stating that she means the master and fellows of the old foundation only; they are to be the devisees under her will. She then goes on to say, that the estates are given to them "for the uses and purposes hereinafter mentioned, viz. for erecting, &c., and for other uses, &c.:" and then she refers to the rules and regulations which have been established by a decree as part of her will. Now it has been argued, that the whole of the rents and profits of the estates were left for the support of Mrs Ramsden's foundation, and that no part of the surplus belonged to the old foundation: it has likewise been argued, that the surplus ought to have been equally divided between the fellows and scholars of the new foundation and those of the old foundation. The question, however, comes at last to this, whether, on the true construction of this instrument, the enjoyment of the surplus is or is not given by this testatrix to the master and fellows of the old foundation, as one of the benefits which they were to receive for accepting this new accession.

There is an intention expressed in this part of her will, respecting not raising the rents of her estates. One question is, whether she meant that the rents should continue the same during the lives of the then tenants, or that the rents should never be raised. If it was her intention that the rents should not be raised during the lives of the then tenants, that would be to give the difference to the tenants for the time being; but if she meant that the rents should forever continue the same, she gave a direction which was inconsistent with the legal devise of the estate; and the court has often held, that it cannot give effect to such words. This sort of clause operates as nothing in either way; it does not narrow the gift. It appears to me that the heir at law, therefore, has no interest in this estate: there is no resulting trust for him, and the information must be dismissed against him, but he must have all his costs.

With respect to the rules, there is hardly any part of them that does not deserve attention. His lordship here read several of the rules. She mentions how the new fellows are to be provided for; appointing that they do have 52*l.* a year, and directs that they should in all things be subject to the rules and statutes of the college. But if I understand it, they are not entitled to all the privileges of the old fellows; they are entitled to vote, together with the old fellows, in the future choice of the Ramsden fellows, but not in the choice of the old fellows; and it is quite clear, that they

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have not, in fact, had the same privileges as the fellows of the old foundation. Then follows the clause with respect to residence, under which the forfeitures were to be thrown into the common stock of the college; this is a very material regulation, because it does not appear to me, that according to the obvious sense of the words "common stock," as expressed in this will, they must mean a common stock of the old and new colleges together, but that the words "common stock" must be taken to mean, the common stock of the college at the time this will was made.

Then follows the 27th rule, which has a peculiar importance, because it is on this clause, connected with every other clause to which we can look for the exposition of the meaning of the words in this clause, that the question depends. If there was any surplus of the rents remaining, it was to be for the benefit of the college, and with the forfeitures to be thrown into the common stock. Now the first question is, what these words, "for the benefit of the college," mean? and I think these words mean, for the benefit of the college of the old foundation; and that the surplus which might remain out of the rents and profits of the estate, after all the purposes of the will had been executed, together with the forfeitures that would accrue in consequence of non-residence, were to be for the benefit of the old foundation, and to be thrown into their common stock, as the common stock of the college. Now, if this clause had ended here, it seems to me to be quite clear, that both the surplus and forfeitures were given for the benefit of the old college; and the difficulty arises on the subsequent words in this clause, directing it to be improved as a fund for repairing, building, buying books, or other such public uses.

Now if an information had been filed on the death of the testatrix respecting her will, it is quite clear that the new and old fellows must have at least admitted that if the surplus with the forfeitures could be improved as a fund for the repairs of the college in general, for buying books, &c., and if such purposes had not been executed, it would have been the duty of the court to have ordered this surplus to be appropriated for the execution of those purposes; and I think at present that it would be my duty to refer this case to the Master, to see whether there is a fund which ought to be set apart for the repairs of the new and old colleges in general, and whether there is any debt remaining which ought to be discharged; and whether any buildings ought to be erected; and whether there ought to be a fund for the purchasing of books for the library; and whether all or a part of the fund should be kept for other uses within the college. The words are, any other public uses within the said college; and it seems to me that the meaning of these words is, any other purposes within the walls of the college.

Then the material question is, with respect to the surplus after all these purposes have been fulfilled. Is it given to the college for their own use and benefit? or does the college take this surplus only because they are devisees of the estate? and does the case, therefore, fall within the rule of those cases, in which the primary intent will determine how the fund so given is to be distributed? Is it one of those cases in which the testatrix has directed that the whole of the surplus should be applied to certain purposes? or is it a gift of the surplus for the benefit of the college, after certain particular purposes have been carried into execution? I take this to be the true way of stating the question. One thing is clear, that if the surplus was no larger than she expected it would have been at the time she made the will, it would be clearly given for the benefit of the old

college; and then are you to say, that they are not entitled to it, because this surplus has increased to a much larger sum than she thought it would do?

She goes on to say, if the rents and profits prove not sufficient to pay the fellows and scholars, she would have the forfeitures, &c. brought in aid, before any thing be laid aside for the common stock of the college. Now by these words she means the common stock that belongs to the old foundation; and does not this show that she did not mean to give them these forfeitures, unless there was a deficiency to make good the payments to them? If this surplus is to go wholly to them, the forfeitures would be taken back out of the common stock, for the benefit of those who forfeited them. The 29th rule directs the expenses of visiting the estates to be paid out of the rents: it has been contended that this direction was unnecessary, if the college was to take the whole surplus of the estate; but that cannot be maintained if you look at the whole of the will, because this is the will of a person who supposes that there might be a deficiency in the fund, and if that took place the college would not have these expenses without this direction, and then it comes back to this question: if she gave the surplus to the old college, supposing it would be small, has the court a right to say, that the devisees who are to take it if it is small, are not to take it if it is large?

Then follow the directions as to the audit, which seem to me extremely material, because the intention with respect to the surplus in 1820 cannot differ from what it was at the time this will was made, in 1743. Now if at the end of the first year after this will came into operation, after the scholars and fellows were all paid, there was a clear surplus of 5*l.*, can any person doubt that that would have been an accretion to the common stock of the old college, forming in the next year a part of their college audit, which is distinguished by the regulations from the audit of this foundation? The new fellows are to assist at the audit of the new foundation with the old fellows: nothing could come under that audit but the account of the rents and clear profits of the estate of the foundress; and no account of any surplus that had been previously thrown into the common stock, could form a part of their audit.

I have gone through all the particulars of the will in this circumstantial manner, because my first impressions, I confess, were not the same with the opinion I now hold, which opinion is, that the surplus ought to be considered as a gift by the testatrix to the college; and that with respect to the rents and profits of the estates not necessary for those purposes, which she specifies in her will, they are taken from the heir at law and belong to the college. On first hearing this case, I thought that any surplus there might be, after all the specified purposes of her will had been satisfied, ought to be distributed between the two colleges in equal proportions, but on looking more particularly and very accurately into this will, I confess it is my present opinion, that this was a gift for the benefit of the old college, and that it was not given by this testatrix to be divided between the two colleges. I think it is impossible to say but that that is the general effect of the whole of her will taken together.

The other question I hardly know how to deal with; for supposing this surplus was given for the benefit of the old college, it is clear that the different purposes which are to be first effected, the erection of buildings, &c., are not to be purposes more for the benefit of the old college than for the new. I feel a difficulty to know what to do with respect to that part

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of the case, because after the fund has become the common stock of the college, is it not a question more proper for the visitor to decide than me? I will give my opinion on that question if I am required so to do.

A question being suggested at the bar, whether the king or the heir at law was the visitor of this foundation, the Lord Chancellor observed, that the foundress had said that she appointed no visitor. The king is the visitor of the old college; and the question is, whether if a person makes an addition to an old foundation, the visitor of that foundation does not become the visitor of the new foundation; and whether the foundress having said that she appoints no visitor, is sufficient to take from him that authority? I have no recollection of any case on the subject; but I should think that if the king was the visitor of the old college, and they accepted an accession to it (which I doubt whether they could do without the king's consent), the king would become the visitor of the new foundation, although the testatrix had said there should be no visitor at all.

His lordship doth declare that the directions contained in the will of Mary Ramsden, the testatrix, in the pleadings named, and the rules thereto annexed, which require that the rents of her estates therein mentioned should continue the same as at the time of her decease, and that no attempts should be made to raise the same, are void, and that the defendant Charles Smith, the heir at law of the said testatrix, hath no right or interest to or in the said real estates, or the rents and profits thereof, or any part of such rents and profits, by way of resulting trust or otherwise. And his lordship doth declare that the surplusage of the rents and profits of the said testatrix's estate remaining after the several deductions and payments in the said 27th rule mentioned or referred to, and which surplusage, together with the forfeitures in the said 27th rule mentioned, are thereby directed to be thrown into the common stock of the college, was, according to the true construction of the said will and rules, intended to be given to the master and fellows of Catherine Hall of the old foundation of the said college or hall; and that as to so much of such surplusage as is not necessary to be applied or improved as a fund for the purposes in the said 27th rule mentioned, the same belongs to the said master and fellows of the old foundation. And it is ordered that the information and bill as to the said Charles Smith be dismissed, with costs to be paid as after mentioned. And his lordship doth not think proper to give any directions touching the application of any part of such surplus rents and profits, and forfeitures, for the purposes in the said 27th rule mentioned at present, or to proceed further than to make such declarations of the rights of the parties as herein are contained, and such order as to costs as hereinafter given; and, subject to such declarations as are hereinbefore contained, and to such directions as to costs as are hereinafter given, his lordship doth order that the said information and bill be dismissed. And it is ordered that it be referred to Mr J., one, &c. to tax all parties their costs of this suit, as between solicitor and client, and also to tax in like manner the costs of the said relators and plaintiffs, and of the said defendants the said master and fellows, of a certain petition touching the matters in question in this suit, presented in the year 1813 to the right honourable the Lord High Chancellor of Great Britain, therein styled visitor of the said college or hall in right of his majesty, and of all proceedings under the said petition. And it is ordered that such several costs, when taxed, be paid by the defendants the said master and fellows, out of any stocks or funds in

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their possession which have arisen from the rents and profits of the estates of the said testatrix.

Reg. Lib. A. 1819, fol. 2608.

White *v.* The Bishop of Peterborough.

Jacob, 402.

Under a bill by a second incumbrancer, a receiver being appointed, and the first incumbrancer taking the benefit of the suit, the costs are to be paid in the first instance, before the demand of the first incumbrancer.

Rolls.—Dec. 20, 21, 1821.

THE defendant Ambrose had granted several annuities, secured by demises of the rectory of Blisworth, of which he was incumbent. The bill was filed by the second incumbrancer, and an order was made for the appointment of a receiver of the tithes, issues, and profits of the rectory, and for the Master to ascertain the priorities of the incumbrances, 3 Swanst. 109. The receiver having paid a balance into court, the first incumbrancer presented a petition, praying that it might be paid to him in part satisfaction of the arrears due to him.

Mr Wingfield and Mr Seton, for the plaintiff, and Mr G. Wilson and Mr Farrer for other parties, contended that the costs of the suit ought to be paid in the first instance. They cited Kenebel *v.* Scrafton, 13 Ves. 370.

Mr Barber, in support of the petition, insisted that the usual rule of the first incumbrancer being first paid his principal, interest and costs, must prevail.

Dec. 21.—The MASTER of the ROLLS mentioned the case of Brace *v.* The Duchess of Marlborough, Mosely, 50, where a decree being made by consent for a sale, and for payment of the creditors, according to their priorities, the costs were notwithstanding ordered to be paid in the first place.

His honour then having stated the facts of the case, proceeded. It comes round to this question: what is the practice when a second incumbrancer files his bill, to have the priorities ascertained, and the first incumbrancer does not insist upon having it dismissed as against him, but submits to it, goes before the Master and states his title, taking the benefit of the suit, for the purpose of obtaining payment of what is due to him? Must he not then contribute to the costs? He is certainly entitled to the benefit of his incumbrance; but the court must consider the suit as being for the benefit of all parties, and the costs must, therefore, be paid out of the fund. But as the petitioner is clearly entitled, as the first incumbrancer, to the whole, after payment of the costs, if you can settle how much it will be necessary to reserve for that purpose, the rest may be paid to him.

Ex parte Fermor, in the matter of Errington, a Lunatic.

Jacob, 404.

A salary allowed to the committee of the estate of a lunatic under peculiar circumstances.
Persons whose place of residence admits of their frequently visiting the lunatic, and inspecting the management of his concerns, to be preferred as committees.
June 10, Dec. 22, 1820; Feb. 10, Aug. 17, Dec. 21, 1821.

UNDER a commission of lunacy, dated in June 1787, J. Errington, Esq., a gentleman of large estate in Northumberland, was found a lunatic. In the year 1788 he petitioned to supersede the commission, stating, that he had for some time enjoyed perfect and constant sanity of mind. Upon the hearing of the petition, the Lord Chancellor, though he did not think fit to supersede the commission, permitted him to have the care and management of his estates, which he continued to have till the year 1800; when, upon his becoming again disordered in his senses, a committee was appointed of his person and estate. By a subsequent order, of the 14th of February 1801, a receiver was appointed of the estates.

The committee having died in December 1819, the usual reference was made to the Master, who approved of two of the next of kin, as the committees of the person of the lunatic, and of another gentleman, as committee of his estate. The nomination of the Master was objected to by six out of nine of the next of kin; and a petition was presented by one of them against the confirmation of the report, and praying that he might be himself appointed committee of the estate. The Lord Chancellor, by an order of the 10th of June 1820, referred it back to the Master to review his report; he, however, continued of the same opinion; and another petition was presented by some of the next of kin, objecting to his report, and praying that two of the petitioners might be appointed committees.

The Lord Chancellor expressed dissatisfaction with the Master's report, on the ground that the persons named by him were all resident in the south of England, and would probably never see either the lunatic or his estate. His lordship, by an order of the 10th of February 1821, referred it back to the Master to review his report, as to the appointment of committees, and at the same time recommended it to the Master to approve of such proper person or persons, if such should be proposed or could be found, whose place or places of residence in the county was or were such as to admit of his or their frequently visiting the lunatic, and inspecting the management of his concerns.

Aug. 17, *Dec.* 21.—The Master, in pursuance of this order and recommendation, approved of two gentlemen of the county to be committees of the lunatic's person, and of a gentleman of the bar, resident at Newcastle-upon-Tyne, to be committee of the estate. A petition was presented by some of the next of kin to confirm the report; it also stated, that the gentleman approved of to be committee of the estate was unconnected with the family, and had been induced, at their request, to suffer himself to be proposed, in order to carry into effect his lordship's recommendation; that the inspecting the estates and receiving and remitting the rents would be

attended with considerable trouble, and it prayed that he might have an allowance or per centage, in the same manner as a receiver.

The Attorney-General and Mr Rose, in support of the petition, cited Ex parte Warren, 10 Ves. 622, and Ex parte Radcliffe, 1 Jac. & Walk. 639; Marshall *v.* Holloway, 2 Swanst. 432, 453.

Mr Wingfield, for some of the next of kin, opposed the allowance of a salary to the committee, as being unusual; and observed, that if the committee was to be paid, that circumstance should have been announced before the reference, as it would probably have led to the proposal of other persons, and might have made a difference in the Master's choice.

The Lord Chancellor. If the question were, whether a committee is generally to receive a salary, I should say, no. But if the question were, whether there may not be cases where he ought to have a salary, I should say, yes. And then the next question is, whether this is one of those cases. I agree, also, that in such cases, in general, the reference ought to be sent to the Master, with an intimation that there is to be a salary.

The order made directed the Master to inquire, and certify, what reasonable allowance, under the peculiar circumstances of the case, it would be fit and proper to make to the committee, for his care and pains in the management of the lunatic's estate, and in collecting and receiving the rents and profits thereof, with liberty to state any special circumstances.

The Attorney-General *v.* Buller.

Jacob, 407.

Gift for the relief of the poor in such parishes and in such manner as the trustees or the survivors or survivor of them, their heirs or assigns, should think fit, so as St N. should be one of the parishes:

Held, that a scheme carried into effect under the orders of the court, by which a small part of the income was devoted to St N., and the bulk of it to a parish in a remote county, was not conformable to the trusts of the will; and an equal division between the two parishes ordered.

Not usual for the court to authorize the sale of a charity estate.

Jan. 21, 22, 1822.

BY indentures of lease and release, dated in August 1635, sir John Hayward of Rochester, in the county of Kent, conveyed the manor of Minster and some other premises, situate in the Isle of Sheppey, to E. Pierce and W. Lewis, and their heirs; to hold to the use of himself and the heirs of his body; and for want of such issue, to such uses as he should by will or deed limit or appoint; and for want of such declaration, upon trust, to make sale thereof, or otherwise convey and settle the same for the erection of workhouses, to set the poor on work, and otherwise for the relief of the poor, in such parishes and in such manner as sir Richard Buller, knight, Francis Buller, Henry Clarke, and Edmund Parker, Esquires, or the survivors or survivor of them, their heirs or assigns, should think fit, so as the parish of St Nicholas, in the city of Rochester,

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wherein the said sir John Hayward then dwelt, should be one of the said parishes: a power of revocation was reserved.

Sir R. Buller, who was the brother-in-law of sir J. Hayward, and Francis Buller, Esq., were described in the deed as of the county of Cornwall: the other trustees, Clarke and Parker, were of the city of Rochester.

Sir J. Hayward died in 1636, without issue, having by will given to the churchwardens of the parish of Great St Alphage, in the city of London, and their successors for ever, the sum of 4*l.*, to be yearly issuing out of a part of the premises at Minster, to be employed for the poor in money or bread: but without having otherwise affected the estates comprised in the indentures of August 1635.

Upon the death of two of the trustees, two others were appointed in 1651 by the survivors, and the estates conveyed to them jointly; and some other vacancies were afterwards filled up in the same manner. The legal estate became ultimately vested in J. F. Buller, Esq., upon whose death, in 1751, it descended to his son: and upon his death, in 1772, it descended to his son, the defendant J. Buller, Esq. In the year 1651 the trustees, by deed, appropriated 50*l.* per annum to the support of a workhouse in the parish of St Nicholas; and about the year 1718 a sum of 1000*l.* South Sea stock, derived from the accumulations of the rents, was assigned to the mayor and citizens of Rochester, to be applied towards the support of schools in the parish of St Nicholas, Rochester, and the parish of Stroud. It did not appear that any other sums had been applied to the purposes of the charity.

The information was filed in 1793. The corporation of Rochester and the parish officers of St Alphage and St Nicholas were made parties. The decree, dated in July 1794, directed the establishment of the charity and the requisite accounts and inquiries. The Master in his report suggested that it would be beneficial that the estate should be sold; and the Master of the Rolls, lord Alvanley, by his decree on further directions, dated in December 1796, directed a sale, which was subsequently carried into effect, and the purchase money, amounting to 12,621*l.*, was invested in the funds.

The Master having been directed to receive proposals for carrying on the charity, by a report made in January 1804, fixed upon a piece of ground at Crediton, in Devonshire, as a fit place for the purpose; and by another report, in July 1805, he approved of a scheme by which the chief part of the income of the charity was to be applied to the maintenance of an alms-house for old men and women, and a school at Crediton; and 20*l.* for two apprentice-fees for poor children of the parish of St Nicholas. These schemes were approved on the proposal of the relators and the defendant Buller; the other defendants did not attend the Master. The reports were confirmed, and the scheme in a great measure carried into execution: the land was purchased at Crediton, the buildings erected, and several poor persons placed in them.

In Trinity term 1806, the defendants, the mayor and citizens of Rochester, presented a petition objecting to the scheme approved of, and contending that they had not been properly served with notice of the proceedings in the Master's office; and an order was made by the Lord Chancellor for the Master to review his report. The Master continuing of the same opinion, he was again directed to review his report; and he then proposed that the parish of St Nicholas should receive the arrears of the 50*l.* per annum from the year 1791, when it had been discontinued, and should also receive that sum annually in future. An exception was

taken by the corporation of Rochester, insisting that a larger allowance ought to be made to the parish of St Nicholas. A considerable delay afterwards took place, from an expectation that in the event of part of the fund being withdrawn from the establishment at Crediton, it might be supplied from another charity in that neighbourhood, in which a surplus was anticipated.

By an order made by the Lord Chancellor on the 16th of January 1821, the arrears of the payment of 50*l.* per annum were ordered to be paid to the church-wardens and overseers of St Nicholas; and one fourth part of the fund arising from the sale of the estates was to be transferred to their account, with liberty to apply for the appropriation of the interest for the benefit of the poor of that parish. The interest of the remaining three-fourths was to be, in the mean time, applied for the establishment at Crediton, without prejudice to any application for varying the future appropriation of it, if it should appear that no additional fund could be derived from the source mentioned above. Any vacancies occurring in the establishment at Crediton were not to be filled up without the order of the court. The number of poor persons there was now reduced to two; and there being no present prospect of any accession to the funds, the cause was brought on again for the purpose of having the property of the charity finally appropriated.

Mr Hart and Mr Sidebottom, for the defendant Buller, contended that the residue of the fund ought not to be withdrawn from the support of the charity at Crediton. The deed of trust of 1635 expresses no intention on the part of the founder with reference to the locality of the charity, excepting in directing that St Nicholas shall be one of the parishes to be benefited; which direction is sufficient to show that that parish was not to enjoy the whole. The selection of the other parishes and objects was to be discretionary, and the condition as to St Nicholas being complied with by the appropriation of a substantial part of the income, there is nothing to fetter that discretion, or to confine the charity to any particular part of England. It is true that the founder and two of the trustees named by him lived at Rochester; but if any implication of an intention to benefit that neighbourhood could arise from the place of their residence, it would be repelled by the circumstance that the two other trustees were inhabitants of a distant county. So, again, the gift to the parish of St Alphage proves that the neighbourhood was not exclusively regarded. The question might in some cases be solved by a reference to the locality of the estate by which the charity was to be supported; but that presumption is rebutted by the power of sale given to the trustees, proving that a permanent connection with the parish of Minster was not contemplated as an essential part of the foundation. The distribution might, therefore, be made at any places, or it might be transitory, accompanying the domicile of the trustees for the convenience of their personal inspection; and the trustee for the time being, Buller, having, under the orders of the court, established the charity at the present spot, the discretion thus exercised ought not to be interfered with.

Mr Martin and Mr Barber, for the corporation of Rochester, argued, that either the whole or a larger share of the fund ought to be allowed to the parish of St Nicholas, and relied chiefly on the former orders made by his lordship, and upon the circumstance of the original trustees, who must be supposed to have better means of ascertaining the testator's in-

tentions than now exist, having appropriated the chief part of the rent to the benefit of that parish. The power of sale was confined to the trustees named by the founder; and the order made for selling the estate, and some of the earlier proceedings in the cause, appeared to have passed without much consideration.

The Lord Chancellor, during the argument, observed, that the court must have been surprised into making the order for the sale of the estate (*a*). Even an act of parliament would not go so far: acts are sometimes passed to authorize the exchange of an estate belonging to a charity for another, but not to convert it into money.

At the conclusion, his lordship said, that the case was certainly involved in great difficulty by what the court had done. Sir John Hayward, in the year 1635, being domiciled in the parish of St Nicholas, Rochester, provides a fund for the establishment of a charity in such parishes as the trustees may think fit, so that that parish should be one of them; and I have always understood that where a founder points out one of the objects that he desires to benefit, the court has been in the habit of paying more particular attention to the interests of that specific object. It appears that a sister of Sir J. Hayward was married to Sir R. Buller: the Bullers were a family of property and consequence in Devonshire, where some of them still are. The other two trustees were Rochester people; and when it is said that it would be difficult for trustees in Devonshire to manage a charity in Kent, it may be answered that it must be equally difficult for trustees in Kent to manage a charity in Devonshire.

It happened that Mr Buller, the defendant, thought that it would be desirable to carry this charity into Devonshire. It is not a subject for any reflections, for it was as much the act of the court as his. An establishment is accordingly erected at Crediton, as I must admit, under the authority of the court. The people of Rochester afterwards complain that this is not according to the trusts of the deed, and I cannot bring myself to think that it is; but the question is how we are to get out of the difficulty. My last order was not conclusive, because I then thought that the establishment at Crediton might be continued by means of the funds of the other charity: now, however, it seems that they are not sufficient.

This brings it to the question whether Rochester is to be sacrificed in the manner in which it has been; or whether Crediton is to be given up; or whether some division should be made between them. I confess that I am not inclined to hold Rochester to the present proportion. I cannot think it was right originally to confine it to two parishes; but if it has so been considered for a long time, I should be much distressed by the consequences of altering it. I think, therefore, the question will be, in what proportion the fund is to be divided between those two places; and if I were bound to decide it now, I should say that it ought to be equally divided.

Jan. 22.—The Lord Chancellor said that it would be extremely difficult to disentangle it, and he therefore thought the best way would be, to make an equal division. So much, therefore, must be appropriated to the benefit of the parish of St Nicholas, as with what has been already set

(*a*) See 2 *Swanst.* 302.

apart for it will make one half of the whole property; and the rest is to be applied to the charity at Crediton.

The order directed the fund in court to be divided into moieties; one moiety to be carried over to the account of the Crediton establishment, and the other to the account of the churchwardens and overseers of the poor of the parish of St Nicholas, in the city of Rochester, who were to be at liberty to make such application to the court, touching the said bank annuities, as they should be advised, for the appropriation of the interest thereof for the benefit of the poor of the said parish, conformably to the foundation thereof by Sir J. H. deceased: and it was ordered that the interest thereafter to grow due on the said bank annuities, before directed to be carried over to the account of the Crediton establishment, should be paid to the defendant J. Buller, for the maintenance of the said Crediton establishment, in manner directed by the previous order of the court, so far as the same would extend, with liberty for him, during his life, or any other person or persons after his death, to make such application to the court as they should be advised; but this was to be without prejudice to the parish of St Nicholas making any further application to the court, touching the application of the bank annuities to be carried over to the account of the Crediton establishment, or of the dividends thereof, or any part thereof respectively, in the event of there being a surplus of the funds in the cause of The Attorney-General *v.* The Twelve Governors of Crediton, after answering the purposes to which the said funds were then, or thereafter should be, applied under the directions of the court.

Reg. Lib. A. 1821, fol. 793.

Cuthbert *v.* Purrier.

Jacob, 415.

Gift by will to A., to be paid to him at twenty-one, with a bequest over in the event of his dying under that age, or afterwards without heirs and intestate:
Held, an absolute interest in A. on his attaining twenty-one.
Rolls.—Jan. 24, 28, 1822.

EDWARD ALEXANDER CUTHBERT, by his will, dated in 1808, after bequeathing several legacies, gave to his brother, Robert Cuthbert, one-third of his remaining property to him and his heirs for ever. He then gave to his natural child, Charles Edward Cuthbert, the other two-thirds of his remaining property, whether real or personal, to be delivered up to him on his attaining the age of twenty-one years: he willed that the property bequeathed to his said son might be secured as follows, till he attained the age of twenty-one years; that is, one-half to be invested in the 3*l.* per cents, or most advantageous British funds in England, and the other half in land (that is to say) an advantageous purchase of a landed estate to be made in any of the counties of England or Wales, for and in the name of the said C. E. Cuthbert, and his heirs for ever. He directed that one-half of the income arising on the bequests to his said son should

be paid to his (the testator's) father and mother-in-law, during their joint and separate lives, and at their decease to fall to his son; the other half of the annual income to be appropriated to the education and maintenance of his son; and such part as might not be appropriated to those purposes to be invested quarterly in the British funds, for the use and in the name of his said son and his heirs for ever, to be paid to him with the principal, on his attaining the age of twenty-one years; and in the event of the decease of his son before his attaining the age of twenty-one years, or of his demising after that period, without lawful heirs, and being intestate, the sum or sums bequeathed to him were to devolve to four other persons, who were parties to this cause.

Under the decree, the residue of the testator's estate had been ascertained. The interest of one-third was directed to be paid to the testator's mother-in-law (his father being dead). His son, C. E. Cuthbert, having attained twenty-one, now presented a petition, praying for the tranfer of the other third part to him.

Mr Wetherall, in support of the petition, cited Ross *v.* Ross, 1 Jac. & Walk. 154(*a*).

Mr G. Wilson on the other side, contended that the limitation over, in the event of the petitioner dying without heirs and intestate, was good; and that he was therefore only entitled to the interest for life, with a power of appointing by will. He cited, Beachcroft *v.* Broome, 4 T. R. 441, and also referred to Attorney-General *v.* Hall, Fitzg. 314, W. Kel. 13; Flanders *v.* Clark, 1 Ves. Sen. 9, 3 Atk. 509; Maskelyne *v.* Maskelyne, Ambl. 750, and Hancock *v.* Horton, 7 Ves. 392.

The Master of the Rolls. The question is, whether the petitioner acquired an absolute interest on attaining the age of twenty-one. The testator gives him two-thirds of the residue of his property, to be delivered to him at that age; which stopping there, purports to be an absolute bequest. Then, after directing the mode of investment, he desires half the interest of it to be paid to his father and mother-in-law: not abridging the absolute nature of the gift, but only disposing of the interest for their lives. What is not appropriated is to be invested in the funds in the name of the petitioner, and paid to him, with the principal, on his coming of age. Thus far nothing could more strongly indicate an absolute interest.

The question arises upon the limitation over, in the event of his dying under twenty-one, or without lawful heirs, and intestate. My present impression is, that this limitation is not good. The first part gives him an absolute property, and the power of disposing of it at pleasure, as a consequence of property. It is then given over if he dies intestate, that is, if he makes no disposition by will; not if he makes none by deed. The power of disposing of it in his lifetime is left to him, as resulting from his property; there is nothing to abridge that.

As the petitioner was a natural son, the property, if he died intestate and without issue, would devolve upon the crown; and it has been argued, that the testator intended to guard against that. But still he did not intend to deprive him of the power of disposing of it in his lifetime. His purpose was to give it to him to dispose of; and if he did not dispose of it by act *inter vivos*, or by will, then to give it over. But in doing this,

(*a*) See the cases in the note, p. 158, and Bradley *v.* Westcott, 13 Ves. 445.

he must not transgress the rules of law: a testator cannot give property, and separate from it the *jus disponendi*.

The case of Nannock *v.* Horton does not apply; for that was a case of an express gift for life, with a power afterwards given expressly as a power; and the distinction is that the legatee takes only the interest which is expressly given. But when the interest given in the first instance is absolute, and it is only given over in the event of the legatee not exercising that power which is incident to and a consequence of property, then the case of Ross *v.* Ross applies; indeed that was a stronger case than the present. Though we can see what the testator intended, yet as he had two objects which are inconsistent, to invest his son with the absolute property, and then to provide for the event of his not exercising his rights over it, I think the court is bound to transfer it to him.

Jan. 28.—The Master of the Rolls stated that he continued to be of the same opinion.

Reg. Lib. A. 1821, fol. 458.

Stratford *v.* Twynam.

Jacob, 418.

A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it.

No jurisdiction in equity to set aside a sale under an execution. *Semble.*

Rolls.—Feb. 16, 1822.

THE plaintiff in the year 1814 granted an annuity to the defendants Twynam and King, secured by a demise of some leasehold premises, and by a judgment for 8000*l.* The annuity being in arrear to the amount of about 900*l.*, the defendants in September 1816 sued out a writ of *fieri facias* upon the judgment, and lodged it with the sheriff of Middlesex, who by virtue of it seized certain other leasehold premises, consisting of several houses belonging to the plaintiff: the premises seized were put up to auction on the 6th of September, and bought by a person employed to bid on behalf of the defendant Twynam for the sum of 705*l.* The bill was filed for the purpose of setting aside this sale, alleging it to have been concerted for the purpose of obtaining the premises at an undervalue, and that no proper notice of it was published. It prayed that the sale might be declared fraudulent, and that the premises might be resold before the Master. It also sought to set aside another security given by the plaintiff, but this latter part of the relief was abandoned at the hearing.

The defendant Twynam admitted having caused the premises to be put up to auction; but said that the sale had been advertised in the public papers on the 4th, 5th, and 6th of September, and had also been announced by posting bills affixed to the houses. He did not know what was the value of the property, but did not admit it to exceed the price. It appeared that a person attended at the sale on behalf of the plaintiff, and gave notice that he intended to dispute the validity of it. There were several other persons who were present, and bid for the premises.

[Stratford *v.* Twynam.]

Mr Simpkinson, for the plaintiff, contended, that upon a sale under an execution, the creditor suing it out ought not to become the purchaser. It would be productive of the mischiefs which have led to the rule that incapacitates trustees and assignees from purchasing. The creditor has the control of the sale, and the means of acquiring knowledge on the subject, of which he may take undue advantage. He should not be allowed to avail himself of his judgment for any purpose beyond that of recovering his debt, upon the same principle on which in Webb *v.* Rorke, 2 Sch. & Lef. 661, it was held that a lease from mortgagor to mortgagee could not be supported. Independently of these considerations, in this particular case, the circumstances called for interference ; the notice given was obviously too short for the sale of property of this description, and the defendant does not assert that the price was adequate.

Mr Treslove, on the other side, argued, that the incapacity to purchase existed only with respect to persons in whom confidence was reposed, and he cited Ex parte Lacey, 6 Ves. 625. By the report of Lyster *v.* Dolland, 3 Bro. C. C. 478, 1 Ves. Jun. 431, it appears that the term taken in execution was purchased by a trustee for the creditor, but no objection was raised on that ground. Even if there had been any irregularity in the conduct of the sale, this court would have no jurisdiction ; the court of king's bench would be the proper tribunal to regulate the execution of its own process.

The Master of the Rolls. I own I feel great difficulty in taking jurisdiction as to the process of the court of king's bench. I must take it that the sheriff did his duty, for if not, it was open to the parties to apply to the court, whose officer he is. I must assume that the sale took place properly, at least except with respect to the person who bought. The judgment was regular, and the execution followed of course ; certainly up to that point this court could not interfere with the process. And in what way could this court now act ? If it were to set aside the sale, there could not be a resale before the Master, for the fruits of the judgment must be brought into the court of king's bench. That court must, therefore, order the resale ; but would it recognize the act of another court setting aside its process ? It might perhaps be of opinion that the first sale was proper, and could the party be left without any execution at all ?

It is of no consequence that the sale may have been at an under value, for we all know that the full price is seldom obtained for property sold under an execution ; and if there be no fraud or collusion, that alone cannot be a ground for setting it aside. It appears, too, that the plaintiff himself was taking steps to deter purchasers.

It comes then to this question, whether the sale was bad because the creditor himself became, through the intervention of a trustee, the purchaser ? Now if the circumstance of the creditor purchasing would induce the court of king's bench to set aside the sale, the interposition of a trustee would not prevent it from inquiring : the point, therefore, to be contended for must be, that if the creditor would at law be permitted to purchase, yet that in a court of equity it cannot be permitted. But on what principle is that to rest ? The case of trustees is quite different ; with respect to them the principle is, that the same person shall not be buyer and seller. But here the sheriff is the seller. In the case of the trustee there is a conflict of duty and interest, and the court therefore says that he shall not be trusted to purchase unless he has divested himself of his character of trustee. The case of mortgagor and mortgagee alluded to

stands again on a different principle, that the court will not allow one man to take advantage of the necessities of another. But here the party is proceeding adversely against his debtor, not by any private dealing, but by the public process of the law; and he is not the person who is to sell: that is the duty of the sheriff; and what injury can arise from the creditor attending at the sale and bidding? I cannot find any principle for saying that he cannot purchase; and it becomes a more serious question, when we consider that there must have been many instances where it has happened; with personal chattels it is often the case, and yet no instance of its being objected to is to be found. On the other hand, one case has been mentioned where this objection might have been raised; and if there existed any such general principle as is contended for here, would it not have been urged by the counsel who argued that case? On every ground it appears to me that I have no jurisdiction.

Bill dismissed with costs.

Beaumont *v.* Dukes.

Jacob, 422.

Specific performance refused, on the ground of representations having been made at the sale on the part of the vendor, of improvements affecting the value of the premises intended by him, which were not carried into effect.

Rolls.—Feb. 11, 21, 1822.

THIS was a bill for a specific performance; the subject of the contract was a piece of building-ground in George street, Stepney, being lot 77 of premises in that neighbourhood, sold by auction in April 1812. The defendant was the purchaser of this lot at the price of 78*l.* In his answer, he stated that the approach to George street from Mile End road was by a very narrow and dirty lane, called White Horse lane, and that the auctioneer at the sale declared that the plaintiff intended to make the lane wide and commodious, and also to make a new street from George street to Mile End road: he said that he was induced to purchase in the confidence that these improvements would take place, as they would much increase the value of the land, but that the plaintiff had not taken any steps towards effecting the alterations, and that he had converted part of the ground, over which the proposed new street was to have passed, into a farm yard.

By the decree made on the 16th of February 1818, it was referred to the Master to inquire whether the plaintiff could make a good title, and when he could make it; and whether the abstract delivered showed that he could make a good title, and when it was delivered. And the Master was also to inquire whether the representations stated by the defendant were made at the sale, and whether any thing had been done upon the ground on each side of White Horse lane, and whether the ground over which the new street was intended to run had been converted to any other purpose.

The Master, by his report, found that the plaintiff could make a good

title, but that the title was not complete till May 1820. To this part of the report an exception was taken, which was overruled.

It also appeared by the report that the plaintiff was not the owner of the White Horse lane, or the adjacent ground; but the plaintiff had, previously to the sale, given to the auctioneer a paper in his own writing, which had been lost, but the substance of which the auctioneer stated to be, that it was in contemplation to widen White Horse lane, by purchasing the houses at the entrance, and to form a new street leading from Mile End road to George street, as represented by the dotted lines upon a map or plan annexed to the particulars, and that if the same could not be otherwise done, the plaintiff would apply to parliament for an act to enable him so to do. This paper, by the plaintiff's directions, was read to the persons assembled at the sale. Nothing had been done on the ground on each side of White Horse lane since the agreement. The Master also found that the ground over which the new street was to run had not been converted to any other purpose; it was, however, stated by a witness, that a part of it had been turned into a farm-yard.

Mr Shadwell, for the plaintiff.
Mr Agar and Mr Phillimore, for the defendant.

The Master of the Rolls. It is fairly admitted that the court, having a discretion either to grant a specific performance, or to leave the parties to law, if the fact be established that any fraud is to be imputed to the vendor, or if there has been any mistake or surprise that operates in conscience against his demand to have the contract performed, it is an answer to him. The defendant here has made two objections in his answer: first, that the plaintiff's title was imperfect; and, secondly, that he purchased on the faith of representations made at the auction by the plaintiff's agent, which considerably enhanced the price, but which, in the event, have not been fulfilled. As to the first point, it appears that the title is now complete, though it was not at the time of filing the bill; that, however, goes to costs only, and not to the main point of specific performance.

As to the second point, it is unfortunate that the paper read at the sale has been lost. Its contents are, however, supplied by the memory of the auctioneer; and the first observation that arises is, that the subject of the representations was not a future project contemplated by a third person. If that had been the case, the plaintiff might have held out the expectations with a degree of uncertainty as to whether they would be fulfilled. If he had said merely that a plan was in contemplation, that would not have been an undertaking to do any thing himself; it would only be holding out a hope as to the future conduct of a third person, not under his control; and it would be the fault of the bidder if he relied on so loose and vague a report. But here the representation went to induce a belief that the plan was in contemplation by himself; we must take it as a statement of what he intended to do himself.

The ground was described as building-ground in a street; and the value of the lot must, of course, depend very much upon the communication to it. The representation that was made was, therefore, calculated to enhance the price; and we must consider it to have been meant, not merely as a loose statement, but to operate on the sale; the auctioneer is authorized to announce it, and a plan, showing the alteration intended, is put

into the hands of the bidders. In one respect, indeed, it is overstated in the answer; for it appears that the plaintiff was not the owner of the land on which the improvement was to be made. This makes a difference as to the certainty of the plan being carried into execution: but he appears to have represented that if he was not the owner, he was about to become so, and that, if necessary, he would even apply to parliament, to overcome any obstacles that might intervene. Surely, then, he held it out to them as a plan with repect to which he was in earnest, and which, in his judgment, was practicable. Then, was he sincere in this? It does not appear that from that time he has taken any step to realize it. When the objection was made in the answer, the onus of showing what steps he had taken, and what had prevented him from completing the improvement, lay upon him. He has not proved it, and we must therefore assume that he has done nothing. Is this keeping good faith with those who listened to his statements? It is perfectly consistent with every thing which appears, that this might only have been a plan upon paper, made use of to allure purchasers, without any design of carrying it into effect.

It comes to this, that the representation stated by the auctioneer was made by the directions of the plaintiff, and that it influenced the purchase; the defendant swears that he bought upon the faith of it; and from the nature of the subject it is reasonable to suppose that he did. I think this does afford a ground for saying, that the plaintiff is not entitled to the specific performance of a contract thus obtained. It must stand or fall to the full extent; we cannot cut down the price, and say how much would have been given if this had not been done. The statement made was not the loose puffing of an auctioneer, but a written declaration by the vendor himself. The contract was obtained by representations made by the vendor as to his future plans, which he has not performed, and it cannot, therefore, be executed by the court of equity.

Bill dismissed with costs.
Reg. Lib. A. 1821, fol. 1076.

Stone *v.* Yea.

Jacob, 426.

Bill to enforce contribution under an agreement by owners and occupiers of land in a parish, to defend and prosecute tithe suits at joint expense, dismissed upon doubtful evidence and long delay.

Persons having a common interest may agree to unite in a defence, but the agreement must not go beyond the common object. And, therefore, an agreement by several owners and occupiers of land in a parish to concur in defending any suits that may be commenced against any of them by the present or any future rector for the tithes of articles covered by certain specified moduses or any other moduses, binding themselves not to compromise or settle, and not limited to their continuance in the parish or to any particular time, is illegal. *Semble.*

Rolls.—Feb. 22, 25, 1822.

THE bill stated certain articles of agreement, made by indenture, dated the 15th of March 1796, between W. Stone, J. Hellings, T. Sur-

[Stone v. Yea.]

rage, J. Rogers and J. Stone, owners and occupiers of lands in the parish of Chipstable, in the county of Somerset, of the one part, and the several other persons executing the indenture, owners and occupiers of lands in the said parish, of the other part; by which it was recited, that the several moduses or ancient customary payments therein mentioned had, from time immemorial, existed and been, and then were paid or payable by the occupiers to the rector of the said parish, in lieu of tithes of the several titheable matters and things therein mentioned; and also divers other moduses or ancient customary payments, in lieu of sundry other titheable matters and things; and that the Rev. S. Richards, the rector, denied the existence of the aforesaid several moduses, and threatened to call for tithes in kind of the several titheable matters and things before mentioned; and that he had lately asserted and pretended that he was lord of the manor of Chipstable, and as such had deprived and threatened to deprive the owners and occupiers of lands of their rights of common, and other valuable rights, which they had from time immemorial used and enjoyed; and reciting that the parties thereto were desirous of having the aforesaid several moduses; and also all and every other modus or moduses payable to the rector, established and confirmed by the decree of a court of equity, and had therefore agreed that a suit or suits should be forthwith commenced for that purpose, and for perpetuating the testimony of witnesses, and had also agreed to oppose and defend all and every demand, claim, prosecution, action and suit which should or might thereafter be commenced by the rector for the time being, or his lessee or farmer, against them or any of them, for compelling them to set forth tithes in kind of the several matters and things before mentioned, for which such moduses were payable as aforesaid, or for not setting forth tithes in kind of any other titheable matters for which any modus had been from time immemorial payable; and also that the parties thereto apprehending that no such manor or lordship existed, had determined to try the right and title of the said Richards thereto, as thereinafter mentioned. It was then agreed, that the said W. Stone, J. Hellings, T. Surrage, J. Rogers and J. Stone, should forthwith exhibit a bill or bills, and prosecute a suit or suits in the court of chancery or exchequer, in the names or name of some one of the parties, on behalf of themselves, and all other the owners and occupiers of lands in the parish, against the present or any future rector, and all other necessary parties, for establishing the several moduses aforesaid, and all other moduses that had been payable from time immemorial, in lieu of the tithes of any titheable matters and things, and for perpetuating the testimony of witnesses for that purpose, and any matter relating thereto; and, further, that if the rector for the time being, or his lessee or farmer, before the establishment and confirmation aforesaid should be had and perfected, or the suit or suits instituted for that purpose should be at an end, should sue or prosecute any of the parties for not setting forth tithes in kind of the titheable matters for which such moduses were payable, they should resist such demand, and defend such suit or suits. It was agreed, that the parties, or any of them, should take such steps, by action at law or otherwise, for trying the right of the said S. Richards to the said pretended manor or lordship, or his right to deprive the owners and occupiers of their aforesaid rights and privileges, as counsel should advise. It was further agreed, that the several parties who were owners and occupiers, or owners and not occupiers, would severally bear, satisfy, defray and discharge all and every the costs, charges and expenses of the proceedings

mentioned above, rateably, according to the annual value of their present respective lands within the parish, as they were rated in the poors rate, and that the parties who were occupiers only as lessees or tenants should bear, contribute and pay to their respective lessors or landlords executing the indenture, a fair and equitable proportion of such costs, charges, and expenses, according to their respective interests in the lands by them respectively occupied, such proportion to be settled by three persons therein mentioned.

It was agreed that none of the parties should release, discharge, discontinue, or disavow such suit or suits, or compound, settle, or agree such claim, prosecution, action or actions, suit or suits, that should be brought against them by the rector, or release, discharge, discontinue, disavow, compromise, or compound any action or suit to be commenced for trying the right and title of the said S. Richards as aforesaid, or any action or suit whatsoever to be commenced, prosecuted, or defended by virtue of that indenture, without the consent of the others in writing. It was agreed, that the two solicitors therein named, or any other attornies or solicitors that the major part of the parties, both in number and in value, as to their lands in the parish, should think fit, should be employed in the different proceedings, and that they should be paid as separate, and not as joint attornies and solicitors, and that the costs of the indenture, and the costs already incurred by them in and about the matters aforesaid, should be paid in manner aforesaid. The parties bound themselves to the observance of the articles in the penal sum of 50*l.* It was lastly agreed that the major part in number and value, as to their lands, might at any time destroy, cancel, and make void the instrument, after all the costs and expenses then incurred should have been first paid.

The articles were executed by fifteen persons, four of whom were the plaintiffs. The bill, which was filed in 1816, stated a suit commenced in the court of exchequer by the rector for tithes in kind, which was defended by some of the parties; a suit instituted in the same court to perpetuate testimony as to the moduses; and an action by the rector against the plaintiff W. Stone, for a trespass on the waste of the manor; that the costs of these different proceedings amounted to 2050*l.*, towards the payment of which the plaintiffs had contributed more than their proportion, but that about 660*l.* still remained due. Several of the parties were dead, two of them having died insolvent, and no administration having been taken out to their estates: the bill was filed against the representatives of the others, and against those who were alive, praying a contribution.

On the part of the plaintiffs, to prove the proceedings in the exchequer, examined copies of the records were produced, and it was proposed to prove them *vivâ voce*, which being objected to, was not allowed. The evidence of the solicitor employed was then offered; this was objected to on the ground of his having an interest to recover the part of his bill of costs which was unpaid; but upon the plaintiffs consenting to waive that part of the prayer, and to confine their claim to the reimbursement of what they had overpaid, the part of his depositions in which he stated payments made to him by the plaintiffs on account of his bill of costs was received.

Mr Shadwell and Mr Stephen, for the plaintiffs.

The case arises out of an agreement by persons jointly interested in legal questions, to unite for the purpose of defending their common rights at

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their joint expense. The plaintiffs having paid more than their proportion, now seek for a contribution from the other parties. This claim may be enforced in equity, although upon a legal demand. Wright *v.* Hunter, 5 Ves. 792; Lingard *v.* Bromley, 1 V. & B. 114. And proceeding in this court avoids the multiplicity of actions which would otherwise be necessary. At law, also, only the aliquot proportion, according to the number of persons liable, can be recovered, although some of them may be insolvent, while in equity those who continue solvent are bound to contribute rateably to the payment of the whole. Cowell *v.* Edwards, 2 Boss. & Pull. 268; Peter *v.* Rich, 1 Ch. Rep. 34; and see Collins *v.* Prosser, 1 Barn. & Cress. 682.

Mr Horne and Mr Lovat, for the defendants.

The contract upon which this claim is founded is, upon general principles, open to great objection. If it does not, strictly speaking, amount to maintenance, it is equally mischievous: it is a combination of a number of persons for the purpose of defeating the rector by means of a common purse, and to co-operate in suits in which they were not all interested. They agree to dispute his title as lord of the manor; a question distinct from that of the moduses, in which they were jointly concerned.

In addition to this and to the failure of the evidence, the length of time elapsed is a decisive objection to the suit. From the date of the contract to the filing of the bill was somewhat more than twenty years. The date of the legal proceedings is not in evidence; we must therefore presume, against those on whom the onus of proof lies, that they immediately followed the contract; and if so, there would be twenty years elapsed from the time of the cause of action arising. The claim of the plaintiffs would, therefore, be barred, even if it were to be considered as founded upon the covenant contained in the deed, the time for a specialty debt being twenty years, and for an executory contract such as this, laches for a much shorter period would be sufficient to preclude relief. But the suit is not to be looked at as one to enforce the covenant: it does not arise from contract, but from the equity of contribution between persons jointly liable; and a demand founded on such an equity ought to be prosecuted within the same time as a simple contract debt; and the plaintiffs are, therefore, barred by analogy to the statute of limitations.

Even if the plaintiffs could succeed in other respects, they cannot compel the defendants to contribute towards the costs more than their proportion according to the value of their lands; for by the deed each stipulates only for paying the proportion which the rent of his land, as rated, bears to the rent of the whole; and he cannot be compelled to go beyond that. A surety may limit his liability to a specified amount, or a specified proportion; and a court of equity will not then extend it. Swain *v.* Wall, 1 Ch. Rep. 149; Deering *v.* Earl of Winchelsea, 2 Bos. & Pul. 270; Craythorne *v.* Swinburne, 14 Ves. 160. See Birls *v.* Betty, 6 Madd. 90. Cowell *v.* Edwards, where it is said that the rate of contribution may be higher in equity than at law, only applies to cases where each party by his contract is liable for the whole: here each contracts only for a definite proportion.

Mr Shadwell, in reply, argued that the agreement was only for the establishment of the moduses, which equally concerned all the parties, and for the defence of their rights of common; it was, therefore, not open to the objection of maintenance. Co. Litt. 368 b., Wild *v.* Hobson, 2 Ves. & B. 112. The suit is not barred by time; the defendants have not shown

that twenty years have elapsed since the demand accrued; and a shorter period is not a bar to this claim, it being founded upon a covenant under seal. The persons who were parties to the suits in question were, of course, liable to the solicitor; he could not sue the others for his costs, not being a party to the deed. But by the deed, each covenanted to bear a proportion; and it is to enforce this covenant that the bill is filed.

The Master of the Rolls. The plaintiffs in this case have brought into court a suit labouring under great difficulties. It is properly stated, not as a claim for the payment of a specific sum by each individual towards the costs, which would not be a case for relief in equity, but as a suit to enforce the known equitable rule of contribution, which proceeds upon this clear principle of justice, that where there is a common burthen, of which one has borne more than his proportion, the others must reimburse him. It calls on the defendant, who has paid nothing, to repay to the plaintiffs the excess of what they have paid.

The claim is resisted on several grounds; first, that the contract is such that the court ought not to assist it; secondly, that there is a failure of evidence to show that the plaintiffs have paid beyond their proportion; and, thirdly, on the ground of the length of time that has elapsed.

First, with respect to the contract itself. I concur in the principle, that when a number of persons having a common interest in the same thing by the same title, unite in a defence, it cannot be called maintenance: champerty is out of the question; it wants that which constitutes the offence, the entering into *alienam litem*. But though the court would not be very strict in observing any unguarded expressions, yet it must take care not to encourage such combinations to go too far. It might operate materially to impede the course of justice, if persons uniting in this manner against an individual could carry it beyond the immediate purpose in which they are jointly interested. Let us see, therefore, if this agreement is restricted as it ought to be.

There are fifteen persons who execute it, uniting in litigation without limit; it is not confined to any period of time, and applies to the present or any future rector. It is a personal contract, and not limited to the time during which the parties may hold lands in the parish. It is not a covenant that runs with the land; therefore, if they sold their estates, it would not fall upon the purchaser: the former possessor and his representatives would be liable for all expenses within the terms of the contract, as far as the others might think fit to litigate. There is no qualification that the proceedings shall be previously agreed on by common consent. There is no control by which, if one suit should be decided against them, they can be prevented from going on as long as any of them may please.

If the court were to decide against the moduses, and some were then to wish not to proceed further, yet if the others desired to go on, they would be bound. And if the rector commences a suit against one of them, who may think that he is not able to resist, what a situation is he placed in? He is bound by a covenant and by a penalty to defend the suit; and what defence is he to make? He must answer upon oath, and is he to say, upon oath, that he believes the tithes in kind are not payable, when he is satisfied by the decision that he ought to pay them? Yet the individual who may be selected by the rector to commence a suit against, is bound to resist, whether right or wrong, whatever his opinion may be, and whatever advice he may have received.

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The first part of the agreement recites the moduses, and they agree to join in defending any suit that the rector may commence for tithes in kind of the articles covered by these moduses; but it does not stop there: it goes on, "or for not setting forth any other titheable matters and things within the said parish, for which any modus or ancient customary payment hath been from time immemorial payable." Thus they are to defend not only those moduses, but any others that may be disputed. If one of the fifteen had a farm-modus they would be bound to support him in it: yet that would not come within the principle of a common interest. It goes beyond the purpose. Because the rector threatens to disturb their moduses, they agree to assist any one whom he may attack. In this passage, too, there is no reference to the opinion of counsel: they do not say that they will act under advice: the mere fact of the rector making the claim compels them to defend.

Considering, then, the nature of this agreement, if there were no other objection, I should think it very doubtful, whether the court ought to assist a contract, which, to say the least, is so unguardedly framed. But when, in addition to this, we remember that it is to involve so many persons and their representatives in such a heavy expenditure, and that it is not brought forward till after a lapse of twenty years from the contract, can any case be more unfavourably circumstanced? Making every allowance, there cannot have been twenty years of litigation, and they were bound to settle as soon as possible. The nature of the contract required expedition, from the deaths and changes of property that must be happening: now the accounts of executor after executor must be taken. The dates of the different proceedings are not given; but it is for the plaintiffs to bring their case within the period that gives them a claim to relief, and the absence of dates enables the other side to assign a time as near as possible to the year 1796. There is no evidence of the nature of the proceedings that took place; they may have been foolish or obstinate, and are we to presume every thing in their favour? In a case like this, the court ought narrowly to look into the different suits, and see that the agreement has not been abused; that they have not let loose the attorney; but that only such proceedings as were proper have been charged for. It was necessary, also, to make out that the plaintiffs have overpaid their proportion; but this is not proved; for the evidence does not show what was the total amount.

With respect to the length of time, it is said, that being a contract under seal, it is not barred till twenty years have elapsed; but to that I cannot assent: for if there be a contract under seal to convey an estate, the court would not enforce it, if nothing had been done under it for a long time, although that time might be less than twenty years. Besides which, this suit is not to compel the payment of a legal debt under the contract, but to enforce the right of contribution, a collateral right depending upon the contract. Upon the general principle, that parties are not to sleep upon their rights, I think it was incumbent on the plaintiffs to show why this suit was not commenced before; a much less lapse of time than twenty years is a sufficient ground for refusing relief in a case like this.

I am not satisfied that any assistance can be given to a contract like this; it is not one that the court ought to encourage or support. There is not the proper evidence; and if the suit could have been sustained at all, it should have been commenced earlier.

Bill dismissed with costs.

Horne *v.* Barton.

Jacob, 437.

A will, directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, to and for the tenants for life, to be exercised by them when qualified, and when not, by the trustees, does not authorize the insertion of a power of sale and exchange.

Rolls.—Feb. 26, March 1, 1822.

THIS cause came on upon a petition of re-hearing, presented for the purpose of correcting a settlement executed pursuant to the decree, so far as related to the insertion of a power of sale and exchange given to the trustees, to be exercised with the consent of the tenant for life. The will of T. W. Smith, upon which the question arose, and the other circumstances, are stated in the case of Brewster *v.* Angell, 1 Jac. & Walk. p. 625. Besides the parts there stated, the will also contained a direction to the trustees, in the event of either of the testator's daughters marrying without their consent and that of their mother, to retain at discretion a part or the whole of their income, and apply it in trust, as therein mentioned. By another will, by which the testator disposed of his personal property, he (amongst other things) gave all his moveable effects in trust for the use and benefit of his wife and daughters, as his executors might apprehend most proper and adapted to circumstances, with due regard to the wishes and desires of his said wife and daughters.

Mr Shadwell, Mr Sugden, Mr Roupell and Mr Raithby, for different parties, contended that a power of sale and exchange, to be exercised by the tenant for life, should be inserted in the settlement. Brewster *v.* Angell only decided that the power could not be given to the trustees. Here the direction is, that there shall be powers for making leases and otherwise. The latter words can refer to nothing but a power of sale and exchange; for a power to appoint new trustees is provided for separately. A power of sale to the tenant for life is not unusual, particularly in old settlements; and if it be unfit to intrust it to him solely, the words *proper* powers authorize the court to introduce a check on him by requiring the assent of the trustees. They referred to Peake *v.* Penlington, 2 Ves. & B. 311, and Williams *v.* Carter, Sugden on Powers, Appendix, p. 669, 3d edition.

March 1.—The Master of the Rolls. The will contains no express authority for the insertion of a power of sale and exchange. If such an authority be given, it is only by general words; and I must observe, in the first place, that if it be matter of doubt, the safest way will be not to run the risk of questions that may be raised hereafter, and may augment the difficulty of carrying the estate to market.

The effect of the will was to give the property to the two daughters for their lives, with powers of appointment to their issue, and cross remainders over; and then follows a direction to insert in the settlement of their shares all proper powers and authorities for making leases and otherwise,

according to circumstances, to and for the tenants for life, to be exercised by them when by law qualified, and by the trustees whenever the tenants for life respectively should be disabled or disqualified by law to act freely and of their own uncontrolled authority. Now, the first point to be considered is, in whom the powers were to be vested; and it is clear that they were to be given to the tenants for life, if qualified, and if they should not be able to act, to the trustees. In that event they are given to the trustees substantively and exclusively; and this is important when we consider that they are to be powers that are *proper;* a relative term, depending on the person who is to exercise them. A power may be proper to be given to one person which is not proper to be given to another. It seems that the powers were to be given wholly to the tenants for life, if qualified; if not, wholly to the trustees.

It is argued that this power must be intended by the words "and otherwise according to circumstances;" for that they can apply to nothing else. But if the testator had this particular power in his contemplation, why was it not named? Whether it is included or not must depend on the context and all the circumstances. Similar words, I observe, are used in another place of the will. He appears to have been apprehensive of his daughters marrying imprudently, and directs his moveable property to be held in trust for them, as the executors should think most adapted to circumstances. If they married without consent, they were to be deprived of part of their shares. Thus considerable doubt was created as to what might be the state of his property and of his family: he might have more children; his daughters might or might not be married; and, making his will in a state of uncertainty, he uses general words, leaving it to the trustees to act according to circumstances.

If the power of sale and exchange is to be given to the tenant for life without check or control, I cannot say that it is a proper power; on the contrary, it may be very dangerous, as the tenant for life may, for many reasons, be induced to sell when it may not be for the benefit of the remainder-men: nor is it usual to give him this power without the check of requiring the assent of the trustees. Take it the other way: if the tenant for life is disqualified by infancy or by marriage (if the testator intended marriage to be a disqualification), can the court say, that it is a power proper to be given exclusively to the trustees? It comes to this question, whether the testator at the time of making his will intended to give to each party, the tenants for life and the trustees, in different events, separately and substantively a power to sell. I think the word *proper* cannot be satisfied by that; and it is not enough to say that the power is proper now; we must consider it as it stood at the date of the will.

The cases that have been cited do not, I think, apply to this. In Peake *v.* Penlington the Lord Chancellor thought the power of sale might safely be given as an usual power; and in Wheate *v.* Hall, 17 Ves. 80, it was only decided that the power could not be inserted where there was no authority at all for it. Still less does the case of Williams *v.* Carter apply; there personal property was settled, with an express power of changing the securities, and a covenant to settle real estate upon the same trusts, and subject to the like powers; and the single question was, whether that did not warrant a transfer of the power to the realty: of that there could be no doubt.

I think in this case it would be dangerous to hazard the insertion of the power upon doubtful authority, and the order confirming the Master's

report must be reversed, and the settlement that has been made must be reformed by striking out of it the power of sale and exchange(*a*).

His honour doth declare that a power of sale and exchange, and partition, is not authorized by the will of the testator T. W. S. to be inserted in the settlement thereby directed to be made of his real estates, and therefore doth order, that the order made on hearing this cause on exceptions and further directions, dated the 30th day of May 1815, so far as it is thereby ordered that the settlement therein mentioned should be executed according to the Master's reporttherein mentioned, by all proper parties, as the Master should direct, be varied by omitting that direction; and, instead thereof, it is ordered that it be referred to Mr Cox, the Master to whom this cause stands referred, to review his report, so far as he thereby approves of the drafts of indentures of lease and release therein mentioned, containing the power of sale expressed in the said drafts. Further directions and costs reserved.

Reg. Lib. A. 1821, fol. 1037.

Aubrey *v.* Aspinall.

Jacob, 441.

False plea put in for delay, ordered to be taken off the file with costs, to be paid by the solicitor.

Feb. 12, March 2, 1822.

THIS was a suit by a legatee against the executor for an account. Before the defendant had answered, the plaintiff died, and a bill of revivor was filed by his executor. To this bill the defendant put in a plea, denying that the present plaintiff was the executor of the late plaintiff, and stating that he, the defendant, was his executor, probate having been duly granted to him, and he referred to the probate. This plea being of matter of record, was filed without oath. The plaintiff first set down the plea for argument, and afterwards had it struck out of the paper, and replied to it. He now moved for leave to withdraw the replication, and that the plea might be taken off the file, upon the ground of its being untrue, and being put in merely for delay.

Mr Hart and Mr Barber, in support of the motion, stated that this was merely a sham plea, and that the novelty of such a proceeding in this court had embarrassed the plaintiff as to the mode of dealing with it, and it was on that account that this motion had not been made in the first instance. They urged that it ought to be treated as a nullity.

On the other side it was contended, that the plaintiff having taken issue upon the plea, had precluded himself from making the present application; and that the truth or falsehood of it ought to be tried in the regular mode.

The Lord Chancellor strongly reprobated the practice. As it was

(*a*) Bayley *v.* Mansell, 4 Madd. 226; Pearse *v.* Baron, ante, 72.

not admitted that the plea was untrue, his lordship desired that the motion should stand over, and that the defendant should produce the alleged probate, which by his plea he referred to.

March 2.—The motion coming on again, it was admitted on the part of the defendant that the plea was false, and it was endeavoured to extenuate it, by comparing it to the fictitious charges sometimes introduced into bills.

The Lord Chancellor. This is the first instance that I have known of so unworthy a practice in this court, though I am told that something of the same sort has lately been done in the exchequer. It is quite different from the charges in bills; for there, in order to obtain discovery, many allegations must be inserted which are founded only on probable suspicions.

Let the plea be taken off the file, and let all the costs out of pocket be paid by the solicitor who gave the instructions for it. I take it for granted that no counsel knew any thing of it. Otherwise I must say, as lord Thurlow did, that it is impossible to keep the practice of the court pure, if counsel lend themselves to such proceedings.

The same order was made in another cause instituted by the same plaintiff with others against the same defendant, in which he had put in a similar plea.

Reg. Lib. A. 1821, fol. 727, 728.

The Attorney-General *v.* The Mayor, Bailiffs, and Commonalty of the City of Exeter.

Jacob, 443.

Account of the rents and profits of a charity estate, decreed for a period of 200 years against a corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount.

March 6, 7, 1822.

NICHOLAS SPICER, in the year 1609, conveyed certain freehold premises to feoffees, upon trust, after the death of Eleanor Brailye, for the yearly payment of 40*s.* worth of bread to be distributed to the poor of the city of Exeter; of 20*s.* towards the repair of certain parish-churches; of 40*s.* towards lighting the city; and of 6*s.* 8*d.* to the night bellman. The residue of the issues and profits was to be lent in sums of from 10*l.* to 21*l.* for four years, upon good security, to such of the freemen of the city of Exeter as the mayor and aldermen should think fit, and some small annual payments were to be made to several of the officers of the corporation. When the number of feoffees was reduced to three, the premises were to be conveyed to such twelve or more of the common council and principal citizens, as to the mayor and aldermen should seem fit. Some years afterwards, the surviving feoffees conveyed the premises

[Attorney-General v. The Mayor of Exeter.]

to the mayor, bailiffs, and commonalty of Exeter, who from that time received the rents and profits. The present information was filed against them for an account, and to have the charity established.

The defendants, by their answer, admitted that they and their predecessors had for a long time been in possession of the premises, having always considered themselves so possessed, upon the trusts and for the charitable purposes contained in the conveyance of 1609, and had applied considerable parts of the rents and profits to those purposes. There had been every year some residue or surplus, the amount of which, they believed, would appear from the books of account of the charity, and they had always been ready and willing, upon proper application being made to them, to lay out and apply such surplus rents and profits agreeably to the purposes of the charity, but no such application had been made to them. It had therefore been retained by them, or by certain members of their body appointed to be trustees or curators of the charity, to their own uses; and they had from time to time duly charged themselves, in their books of account, with the sums so retained by them, and were willing to account for the same as the court should direct. The estates had been let at low rents, with large fines, which had been received by the persons appointed to be trustees or curators of the charity, and duly brought to account as part of the rents and profits applicable to the purposes of the charity; and they referred to their books of account for the amount of the fines so received. They had, out of the rents and profits, paid the specific annual sums directed by the founder, but had employed very little in the advance of money on loan. They denied any abuse, unless the court should be of opinion that they or their predecessors, by borrowing the surplus rents and profits, which, for the reasons aforesaid, could not be applied to the purposes of the charity (always charging themselves as debtors for the amount), had been guilty of any abuse.

The decree made by the late Master of the Rolls, on the 22d March 1813, directed an account of the rents and profits of the estates, and of the fines taken for the renewal of leases, come to the hands of the defendants, or of any person or persons for their use; and the Master was to state, at what times such fines were received, and in what manner the same and the rents and profits had been applied. It also directed some other inquiries. The defendants, in April 1821, petitioned for a rehearing, on the ground of the account having been directed without limitation of time. It was stated that the accounts had been proceeding in the Master's office in the mean time, and that the defendants had, under an order made upon their examination, paid into court a sum of 1900*l.*; and the Master, by his report made between the presenting and the hearing of the petition of rehearing, found a further sum of about 5000*l.* due from them.

Mr Shadwell and Mr Merivale, for the defendants.

The question here is, for what period of time a corporation, who are trustees of a charity, shall be compelled to account? The decree, as it stands, assigns no limit, and the consequence is, that the account must go back for two hundred years. The inconvenience and injustice that must result are obvious. It is of course impossible, in inquiries into such very distant transactions, to attain to a result at all approaching the truth. The want of documents and evidence must drive the Master, in executing this decree, to proceed more by conjecture than by calculation. The same reasons that, in every other case, have occasioned a limit to be set to remote demands, exist here. Accordingly, although the statute of limita-

tions does not apply to cases of trusts for charity, yet the court exercising a discretion in decreeing the account, has always thought fit to limit it to some definite period, most commonly to the filing of the bill, and sometimes to previous demand; sometimes the period of six years has been taken by analogy to the statute (Attorney-General *v.* Christ Church, post.), and sometimes twenty years. It is laid down in 2 Eq. Ca. Ab. 12, that although a charity is not barred by the statute of limitations, yet that it is a good rule how far back to carry the account. In Attorney-General *v.* Johnson, Ambl. 190, Reg. Lib. 1853, fol. 113, the charity was held entitled to the surplus rents, but it appears by the register's book that the court declared that, under the circumstances of the case, it did not think proper to decree the account beyond the filing of the information. In the case of The Attorney-General *v.* The Mayor of Coventry, 2 Vern. 397, Colles Parl. Cas. 280, 7 Bro. Parl. Cas. ed. Toml. p. 235, and 3 Madd. 353, the account was directed only from the hearing in the house of lords. In the late case of The Attorney-General *v.* The Skinners' Company, 4 Madd. 173, the account was given from the filing of the information. In the same way in the cases where leases of charity estates have been set aside as fraudulent or improvident, no retrospective account has been given beyond the filing of the bill or previous demand. Attorney-General *v.* Owen, 10 Ves. 555; Attorney-General *v.* Griffith, 13 Ves. 565. It is true, that in Attorney-General *v.* Bower, 3 Ves. 729, lord Loughborough appeared to think, that he was bound to decree a general account; but the cases cited disprove that notion; and it was the clear opinion of lord Eldon, in Attorney-General *v.* Dixie, 13 Ves. 519, a case of great abuse, that although an account was prayed for without limitation, yet the court might act according to its discretion, and in that case he gave the account only from the filing of the information, with inquiries as to the leases improperly granted.

Mr Roupell and Mr Girdlestone, for the relators, cited The Attorney-General *v.* The Brewers' Company, 1 Mer. 495, where an account of a charity fund was decreed from the commencement of the relator's right; sir W. Grant, in his judgment, disclaiming any analogy to the statute of limitations. They also relied upon the defendants having in their answer submitted to account generally.

The Master of the Rolls. It has, I think, been properly stated on both sides, that there is no fixed limit of time in directing an account against a trustee of a charity. Notwithstanding the case which has been cited from a very inaccurate book, the statute of limitations is not the rule. It is not a bar in the case of a charity, or as between cestui que trust and trustee. It is material to observe the manner in which length of time operates. In cases within the statute there is a fixed bar, after a certain period; and if that period be exceeded, it is of no consequence how much or how little. There are other cases again, where length of time operates not as a bar, but as raising a presumption that a debt has been paid, or a right released.

Neither of these cases applies to that of cestui que trust and trustee; it does not, however, follow that relief will be given after a great length of time, it being the constant course of courts of equity to discourage stale demands; even in cases of fraud, in which, if recent, there would have been no doubt, lapse of time has induced the courts to refuse their interference. In cases of charities this principle has often been acted on. When there has been a long period, during which a party has, under an inno-

cent mistake, misapplied a fund, from the laches and neglect of others, that is, from no one of the public setting him right, and when the accounts have in consequence become entangled, the court, under its general discretion, considering the enormous expense of the inquiries, the great hardship of calling upon representatives to refund what families have spent, acting on the notion of its being their property, has been in the habit, while giving the relief, of fixing a period to the account. Unless it be upon these grounds, I do not know how the court can take upon itself to set a limit. The accident of when the information was filed, or when the demand was made, can only be material as putting the parties on their guard, and therefore leaving them without excuse for any errors they may commit. It must be admitted, that the result of the authorities is, that in each case the court is bound to be guided by the particular circumstances.

The defendants here object to the account as directed by the decree, but they do not state to what period it ought to extend. Now I will suppose the case of trustees called on to account for the receipts of two or three hundred years, who admit the receipt, and say that they have conscientiously laid up the money, and that they have it ready for the charity: or that they have invested it in the funds or in land, unmixed with other money. What is the court then to do? Can the court give to the trustees a part of the money or the land which they acknowledge not to be theirs? It is admitted to belong to the charity, and the charity must have it. There is no difficulty from complicated accounts; all the topics of hardship that may sometimes be urged, fail of application to such a case.

Now let us see whether this case does not in substance amount to that which I have put. The defendants have in their answer very honourably and fairly disclosed the truth, acknowledging that they took upon themselves the situation of trustees, and received the rents and profits of the estates. They say, that no applications being made to them for loans, they applied only a small part to the purposes directed by the testator. It is obvious, then, that there must have been a considerable surplus. It is not alleged, that the corporation themselves had any right to it; then what became of it? As I understand the answer, the defendants take considerable credit to themselves for having recorded their receipts in their books, charging themselves as debtors for the amount of the surplus, as having borrowed it of the charity. The amount, they say, will appear from their books, and they have always been willing to account for it. They have always considered themselves liable to account without limit or stint: there is not a word that points at any period or limit; they do not allege that there is any period beyond which their books do not extend. How then is it possible for the court to fix a limit which the defendants do not ask for? Is the court to force them to be unjust? The account directed must be commensurate with the admissions of the answer, and, in point of fact, the difficulties supposed to exist have been got over, the account having already been taken. The question is not, what decree ought in general to be made? but whether this was not the only decree that could have been made upon this answer?

The case of The Attorney-General *v.* The Brewers' Company shows, that the court must regard the particular circumstances of each case. If the decision there was right, how can this case be distinguished?

Decree affirmed.

Reg. Lib. A. 1821, fol. 1132.

Colpoys *v.* Colpoys.

Jacob, 451.

A testator gives to some persons annuities of £— long annuities, and to several others legacies of £— long annuities, on one of which he directs interest to be paid at 5*l.* per cent.

Evidence of the amount of his property admissible to explain the meaning of the latter bequests, and his property being insufficient to pay them in long annuities, held that sums of money to be raised out of his long annuities were intended.

Rolls.—Feb. 16, March 11, 1822.

ADMIRAL sir John Colpoys, by his will, dated the 12th of November 1818, gave all the property, of whatsoever kind or denomination, he might die possessed of, to L. S. Willett, esquire, and captain C. Dilkes, in trust, for the purposes aftermentioned. He gave to his niece, Mrs Patience Baker, of Dublin (if living at his decease, and for her sole and separate use, and for which her receipts only were to be valid), an annuity of 100*l.* long annuities: and in failure of her, or at her death, the said annuity to be equally divided among all her daughters then living, for their sole and separate use, share and share alike, over and above any legacies they might be entitled to by that his will, or by any codicil. He gave to his niece, Mrs Ann Bloomfield, residing in Dublin, if living at his decease, an annuity of 100*l.* long annuities, for her sole and separate use; said annuity to devolve at her death to his nephew, rear-admiral Griffith (afterwards Griffith Colpoys), and his heirs. He gave to each of his grand nephews, living at his decease, 100*l.* long annuities. He gave to Mr T. Abbott, of Dublin, husband of his late niece, Mrs Ann Abbott, if living at his decease, 100*l.* long annuities. "I give to the twin son of the above Mr Abbott, I think his name is Edward Singleton, if living at my decease, 100*l.* long annuities, with 5*l.* per cent interest thereon from the day of his birth, said interest not to be considered as accumulating. I give to Mr W. Colpoys, of Passage, Waterford, if living at my decease, an annuity of 20*l.* long annuities. I give to each of the children of the said W. Colpoys, living at my decease, 50*l.* long annuities. I give to all my grand nieces, that may be living at the time of my decease, for their sole and separate use, to be among them equally divided share and share alike, over and above any other legacies they may be entitled to by this my will, or by any codicil I may think fit to add thereto, 5000*l.* long annuities." He gave to the Rev. G. Madder, and to each of his sisters, ten guineas, as a testimony of his regard; to vice-admiral J. Dilkes 100*l.* long annuities; to Miss F. Sterling 50*l.* long annuities; to Miss M. Bourmaster 50*l.* long annuities; and to Miss A. Armstrong 50*l.* long annuities; and proceeded thus: "Should I, in my lifetime, by any visitation of Providence, be rendered incapable of attending to my own affairs, it is my particular request that all annuities left by me to any of my relations, also the interest of any legacies left them, may be regularly paid them by Messrs Hoare, Fleet street, so long as I live, or may continue in that helpless state. I also desire that the remaining part of my income, whether funded or other property, shall be regularly paid as it becomes due to my nephew, rear-admiral Griffith (by Messrs Hoare), or his order, for my support and

his trouble during my incapacity; and in failure of him, to his nieces, Mrs Ann Grace and Mrs Susan Houghton, of Dublin, but not to remove me out of England." He gave to each of his trustees fifty guineas, and directed that they should be fully reimbursed any expenses they might be subjected to by the trust. He acquitted all his relations of any moneys lent or given them in his lifetime; and gave to his nephew, rear-admiral Griffith, all and whatsoever sort of property, of whatsoever kind or denomination, he might die possessed of, not disposed of in the former part of his will, or by any codicil: in the event of his nephew dying before him, he gave to Mrs Patience Baker, for her sole and separate use, an additional annuity of 100*l.* long annuities; and in failure of her, or at her death, said annuity to be equally divided amongst all her daughters. In the event of his said nephew dying before him, he gave to his children the property to which their father would otherwise have been entitled. He appointed his said nephew his sole executor; but in the event of his dying before the testator, or of his being abroad at the time of his decease, he deputed Lachlan M'Lean and Richard Houghton to act in all respects for him, until they should receive further instructions from his nephew; and in consideration of any trouble they might be at, he requested their acceptance of 100*l.* each long annuities, and all their expenses to be reimbursed.

The testator made several codicils, in one of which he expressed his regret at being unable to leave mementos to many other kind friends, and trusted it would not be attributed to neglect on his part. He died in April 1821.

The bill was filed by several infant legatees, to whom legacies of long annuities were given by the will, against the executors and trustees, for payment of their legacies. The defendants, in their answer, stated, that the testator's property, at the time of his death, consisted of 1190*l.* consolidated long annuities, 3000*l.* three per cent consols, about 1800*l.* in cash at his bankers, and furniture and other effects to the value of about 900*l.* Those of the legatees to whom long annuities were given, who were adult, had consented to accept their legacies in gross sums in pounds sterling, of the numerical amount mentioned in the will, and the defendants submitted that this was the testator's intention. The cause came on upon bill and answer.

Mr Wingfield and Mr Norton, for the plaintiffs.

Mr Horne and Mr Simons, for the defendant.

The proper mode of construing this will, is to understand the testator when he gives legacies of sums of long annuities, to mean sums of sterling money to be raised out of his stock in the funds, which formed the bulk of his property. In some instances he gives annuities of long annuities; the two expressions cannot be used with the same meaning: the latter must refer to annual payments, and the contrast between them proves that by the former gross sums must be intended. Again, he gives to one person 100*l.* long annuities, with interest at 5*l.* per cent, language which is unintelligible, except as to a sum of money; and in the subsequent part of his will, where he is contemplating the possibility of his becoming incompetent to manage his affairs, he makes a distinction between his legacies and annuities. These circumstances show, that he did not consider himself to be giving annuities to all. The large amount of these bequests furnishes a similar inference. The long annuities are worth about 1800*l.*

per cent, and would he be likely to request trustees to accept so large a sum for their trouble? But the argument is irresistible when the amount of the legacies is compared with the amount of his property, which, according to Fonnereau *v.* Poyntz, 1 Bro. C. C. 472, may be inquired into in a case of this description. His whole fortune bears but a small proportion to what he has given away, if the other construction is to be adopted, and yet he conceived there would be a residue remaining.

Mr Wingfield in reply contended, that the distinction in the language of the bequests, did not necessarily show a different intention. The same occurred in Attorney-General *v.* Grote, 2 Mer. 316, where the testatrix gave to some charities "5*l.* per annum long annuities," and to others "100*l.* long annuity stock," and although there were other circumstances tending to show that the latter meant money only, yet the literal construction was adhered to. Stafford *v.* Horton, 1 Bro. C. C. 482, is to the same effect. The other remarks made upon the will, only prove, that it was not framed with accuracy, and cannot control the meaning of words so plain as these. This case differs from Fonnereau *v.* Poyntz in the expressions used; and notwithstanding that decision, it has always been considered, that external evidence as to the state of a testator's property must be excluded in the construction of the will. Jones *v.* Tucker, 2 Mer. 533; Webb *v.* Honnor, 1 Jac. & Walk. 352.

The Master of the Rolls. From the importance both of this particular case, and of the general question which it involves, I shall not at present decide it; for I cannot enter upon the construction of the will, till I have satisfied myself whether it is my duty to look at the will only, or whether I can consistently call in aid the amount of the property. I feel that in endeavouring to come to a decision, the mind will advert to that circumstance, and is liable to be biassed by it; and I will not, therefore, venture upon the consideration of the subject, till I can ascertain whether any thing beyond the will may be looked at. I have understood the general rule to be, that extrinsic evidence is only to be let in in some particular excepted cases; that when there is a latent ambiguity raised by extrinsic circumstances, it may be got rid of in the same manner; but not when the ambiguity is patent, arising on the face of the will; there the general rule is, that it is to be construed by its contents only, although in the particular case the court might be desirous of having recourse to other considerations.

Suppose the will to be in terms admitting of no doubt; it is clear that the amount of the property could have no influence on the construction. If a man worth 1000*l.* were to give to twenty people 1000*l.* each, it might be said that he was insane; but it could not be argued from the deficiency of assets, that he must have meant something else; the legatees must abate in proportion. The great difficulty is, whether we may resort to extrinsic circumstances, when the terms are not altogether free from doubt, to assist in disposing of a patent ambiguity. If the extrinsic evidence had been of declarations at the time of making the will, on general principles it could not be received.

Many acute and ingenious observations have been made upon the will itself; if you could in that manner put a construction upon it, that would be consistent with all sound principle; but if the reasoning from the language of the will only goes the length of raising doubts, can you then let in the evidence? It is a mixed argument, partly upon the words and

partly upon the extrinsic matter. Therefore, I asked of the counsel, what the construction would be, if the property had been sufficient. Would it not then have been said, that notwithstanding these nice distinctions and critical observations, they are all gifts of annuities? I am, therefore, unwilling to give much weight to those arguments, as I feel that I should not be influenced by them if the property were larger.

Extrinsic evidence may be admitted as to the nature of the thing described; but here the bequests are not specific; they are to be satisfied out of the general property; the quantity of long annuities that the testator was possessed of is, therefore, no guide. It comes to this, whether the amount of the property is to be regarded in construing the will? Is it to be construed in one way for a rich man, and in another for a poor man? Is the construction to vary from time to time with the state of the testator's circumstances? He may be a rich man at one time, and a bankrupt at another; are we to inquire how he was situated at the times of different republications?

His honour concluded with expressing a wish to have the case re-argued with reference to the question, whether the consideration of the state of the testator's property was admissible.

March 11.—Subsequently to the argument, another codicil was found among the testator's papers, and was proved. It contained (amongst other things) these words, "My banker's book will fully explain all my money concerns." The book referred to contained regular entries of the dividends upon his long annuities and other funded property. The case was this day re-argued.

For the defendants.

The question is, whether the difficulties apparent upon this will may be explained by considerations arising from the amount of the testator's property. That the state of the property is never to be regarded, is a proposition far too general. We know that, in fact, in all cases where a will is to be construed, the court is, by means of the usual inquiries, put in possession of the state of the testator's affairs; we seldom hear a judgment pronounced in such a case, without some remarks relating to it: and how can it be supposed that it does not often influence the judgment when it is thus adverted to? In Fonnereau *v.* Poyntz, the difficulty with lord Thurlow was, whether there was sufficient ambiguity on the face of the will to let in extrinsic considerations: having satisfied himself that the interpretation was doubtful, he did not hesitate to remove the doubt by a reference to the state of the property. This case has not been controverted. In Selwood *v.* Mildmay, 3 Ves. 306, it is recognized by lord Alvanley, who treats it as clear that the testator's circumstances are to be laid before the court; and says, that his estate being insufficient to satisfy his legacies, raises a latent ambiguity, to explain which extrinsic evidence may be received.

But independently of this reasoning, the last codicil, by referring to the banker's books for the state of his concerns, makes the contents of them admissible. In Barksdale *v.* Gilliat, 1 Swanst. 562, the Lord Chancellor thought that a paper written by the testator, containing calculations as to his fortune, and its inadequacy to the payments he directed, made it competent to the court to inquire into the proportion of its amount to the demands on it, with a view to the construction of the will. If, upon either

of these principles, the amount of the property is considered, the effect is to render it clear that the testator could not have intended gifts of annuities to so great an extent.

For the plaintiffs, the general rule, that parol evidence is not admissible to explain a patent ambiguity, was relied on, and Doe dem. Hanson *v.* Fyldes, Cowp. 833; Lord Walpole *v.* Earl of Cholmondeley, 7 T. R. 138; Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516, and Jones *v.* Curry, 1 Swanst. 66, were cited. Fonnereau *v.* Poyntz, is the only case in which the state of the property has been considered, except with reference to a specific legacy; and according to what is said by the Lord Chancellor in Druce *v.* Denison, 6 Ves. 401, the only ground on which that decision can be supported is, that the testatrix had given as stock that which was of no known denomination of stock; and that the bequest, taken alone, was therefore unintelligible, and extrinsic evidence necessary to explain it. But here nothing can be more plain than the language; the testator gives long annuities, as to the meaning of which there can be no doubt. Stafford *v.* Horton, which, from Mr Belt's note, and the register's book, Reg. Lib. B. 1784, folio 533, appears to be inaccurately reported, was a case of a specific legacy. It may be admitted, that according to Wilkinson *v.* Adam, 1 Ves. & B. 445, the banker's book might be received under some circumstances; but not, as in this case, to construe the will; for the testator has not here calculated the amount of his property, and spoken of it as the guide to him in making his testamentary dispositions: he only refers to it in general terms. If the inquiry could be made, how are we to fix the period at which the state of the property is to be regarded? Is it to be at the time of making his will, or at the time of his death?

The Master of the Rolls, after stating the will, and commenting upon the several parts of it, proceeded as follows:

This is the will, and the first thing to be observed is, that the will refers to the fund in terms not strictly and technically applying to it. It is noticed in Fonnereau *v.* Poyntz, that the proper expression is "interest or share in long annuities," 1 Bro. C. C. 473. The holders have no capital, or interest, or dividend, but are entitled to an annuity only. The other funds are distinguished by being permanent, consisting of capital with interest payable upon it. Lord Thurlow, referring to this, says, "the case is, that there is no such fund as is described by the will. When the words used by a testator are sensible, they must be taken as they stand: if not, the construction must be taken aliunde." It is a nicety, but it is the reasoning of lord Thurlow. He thought that, if the bequest had been in strict and technical words, he should have been bound by it; but the language not applying strictly, and therefore being capable of two interpretations, entitled him to let in the parol evidence.

The case of Fonnereau *v.* Poyntz was three times before lord Thurlow. At first, he thought the state of the property material to influence his decision, and directed inquiries; when it came back upon the report, he thought the language sufficiently certain, and that he was bound to adhere to it; but, on the re-hearing, he changed his mind, and returned to his original impression, that he might look at the state of the property, and allow it to operate on the construction. "There is no doubt," he says, "if the word stock had been left out, but the meaning would be, that the sum of 500*l.* was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain twenty-

one. This being the doubtful interpretation upon the face of the will, the question arises, whether the state of the testatrix's fortune is not applicable to the construction." He adds, that, "it is perfectly inconsistent to say, that she could mean to give ten times more than she was worth in legacies;" and that he should let in the evidence, "not to control the bequests which the testatrix has made in words themselves distinct, nor to control a bequest which she had made of a subject which she had accurately described; but because the words she has used in the description are, upon the whole of the context, uncertain whether she intended it as the interest of a gross sum to accumulate, or 500*l.* per annum." He decided, that he was bound to consider the amount of the property, and then draw his inference from the enormous disproportion of the bequest, calculated as long annuities.

Without then going through all the authorities on the subject of latent and patent ambiguities, it being admitted that this case has stood the test of time, we must take it to be right, and the question will be, whether it is similar to the present, and furnishes a rule for it.

Lord Elden who was himself counsel in Fonnereau *v.* Poyntz, recognizes its authority in Druce *v.* Denison, 6 Ves. 401, explaining the ground on which it was decided to be, that the testatrix had given that which was of no known denomination of stock, and states that it did not carry the cases upon parol evidence farther than they had gone before. Lord Alvanley, in Selwood *v.* Mildmay, 3 Ves. 306, mentions it with approbation, and it was acted upon in Finch *v.* Inglis, 3 Bro. C.C. 420; the case of Attorney-General *v.* Grote, 3 Mer. 316, as far as it goes, is a recognition of it.

The authority of that case may, therefore, be considered as established. Does it then differ from the present? In some respects it is stronger, in others not. The word *stock* being used, made it look more like a bequest of stock than of money; that word is not to be found here. Again, there all the bequests were uniform. But this case is marked by the striking circumstance, that he sometimes gives gross sums of long annuities, and sometimes annuities of long annuities. Are we to suppose that he means the same thing by these different expressions? In Fonnereau *v.* Poyntz the distinction, that the interest should accumulate was much relied on; interest upon an annuity being an absurdity; that is a feature which belongs to this case also, and it is besides characterized by the testator dividing his bequests into annuities and legacies, and distinguishing between them.

With respect to the case of Stafford *v.* Horton, 1 Bro. C.C. 482, it is enough to say, that the bequest was determined, whether correctly or not, to be specific. It cannot, therefore, bear upon the present, where it is agreed not to be specific. The Attorney-General *v.* Grote is evidently distinguishable. The testatrix was possessed of 385*l.* per annum, bank long annuities; the annuities given amounted together to about that sum; the late Master of the Rolls thought it clear, that she was doling out portions of her long annuities? there being nothing to show any inadequacy; and in determining it he professed not to quarrel with Fonnereau *v.* Poyntz.

Thus, then, that case stands in point of authority, and if my private opinion were different, I should not think myself at liberty to oppose it to such a decision: it is a great relief to me to have such a guide, leading safely to the conclusion, that when the testator speaks of annuities he means annuities, and that when he speaks of sums he means sums only;

and that though he has not with the accuracy of a lawyer used the words *out of* his long annuities, or, *in* long annuities, yet that he meant, that all should be raised out of his property in that fund.

I would add, that I hope it will not be supposed, that I dissent from the case of Fonnereau *v.* Poyntz; nor that I agree to the opinion, that parol evidence is never to be let in, except in cases where there is a latent ambiguity. The admission of extrinsic circumstances to govern the construction of a written instrument, is in all cases an exception to the general rule of law, which excludes every thing dehors the instrument. It is only from necessity, and then with great jealousy and caution, that courts, either of law or equity, will suffer this rule to be departed from. It must be the case of an ambiguity, which cannot otherwise be removed, and which may by these means be clearly and satisfactorily explained. This is always permitted in the case of a latent ambiguity, which not appearing on the face of the instrument, but arising entirely from extrinsic circumstances, may always be removed by a reference to extrinsic circumstances.

In the case of a patent ambiguity, that is one appearing on the face of the instrument, as a general rule a reference to matter dehors the instrument is forbidden. It must, if possible, be removed by construction, and not by averment. But in many cases this is impracticable; where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed: if in such cases the court were to reject the only mode by which the meaning could be ascertained, viz. the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense, and the law of England (which are seldom at variance), warrant the departure from the general rule, and call in the light of extrinsic evidence. The books are full of instances sanctioned by the highest authorities both in law and equity. When the person or the thing is designated on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument. When a legacy is given to a man by his surname, and the Christian name is not mentioned, is not that a patent ambiguity? Yet, it is decided, that evidence is admissible, Price *v.* Page, 4 Ves. 680. So where there is a gift of the testator's stock, that is ambiguous, it has different meanings when used by a farmer and a merchant. So with a bequest of jewels; if by a nobleman, it would pass all; but if by a jeweller, it would not pass those that he had in his shop. Thus, the same expression may vary in meaning according to the circumstances of the testator.

To show how mistaken the idea is, that extrinsic evidence is never to be received in cases of patent ambiguity, we may refer to a case in the house of lords, unquestionably of that description, where the evidence was admitted. I mean the case of Doe. dem. Jersey *v.* Smith. Mr Justice Bayley thus states the principle on which it was introduced. "The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; *but because there is an ambiguity upon the face of the instrument;* because an indefinite expression is used capable of

being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation, would assist us in judging what was her meaning by that indefinite expression." 2 Broad. & Bing. 553.

If it were necessary, I could refer to many other instances of resorting to extrinsic matter in cases of patent ambiguity; but this decision I ground upon the case of Fonnereau *v.* Poyntz.

His honour doth declare, that the several legacies to which the plaintiffs are entitled under the testator's will, are not to be considered as legacies of long annuities, but only pecuniary legacies to the amount of so much gross sums respectively, and his honour doth also declare, that Patience Baker, Ann Bloomfield and William Colpoys, are the only legatees entitled to have their legacies considered as legacies of long annuity stock.

Reg. Lib. A. 1821, fol. 972.

Jones *v.* Frost.

Jacob, 466.

Demurrer allowed to a bill praying that a pretended will might be delivered up to be cancelled, and an injunction and a receiver, till letters of administration should be granted, the pendency of a suit in the ecclesiastical court not being distinctly alleged, and the court of chancery not having jurisdiction to try the validity of the will.

Several causes of demurrer may be assigned.

March 16, 1822.

THIS case is reported upon the original hearing before the Vice-Chancellor, in 3 Madd. 1. The plaintiffs appealed from his order, allowing the demurrer.

Mr Hart, Mr Agar and Mr Roupell, for the plaintiffs, contended that the form of the demurrer was bad, several causes of demurrer being assigned, which was objectionable in the same way as a double plea; it must be overruled if any of the causes assigned were bad, as was the case here. And, with respect to the equity of the bill, they cited Atkinson *v.* Henshaw, 2 Ves. & B. 85, and argued, that a case was stated, calling for the court to interpose a receiver, pending the proceedings in the ecclesiastical court.

Mr Shadwell and Mr Barber, on the other side, argued, that the bill did not contain any distinct allegation of the pendency of a suit in the ecclesiastical court. The delivery up of the will and the other matters prayed for were not within the jurisdiction of this court, and on this point they referred to Jones *v.* Jones, 3 Mer. 161. Demurrers for several different causes are very common; if any one of the causes assigned holds good, the demurrer is allowed. Harrison *v.* Hogg, 3 Ves. 323, is an instance.

The Lord Chancellor. The common language of the court, with respect to pleas and demurrers is, that a plea may be good in part and bad

in part; but that a demurrer, if bad in part, is bad as to the whole. But I never heard that you might not assign more causes of demurrer than one.

I agree, that though this is an extraordinary bill, it is better that it should be got rid of in the ordinary way, than that we should refuse the application of the ordinary rules of the court to it. It seeks to give the court jurisdiction to try the validity of a will of real estate, as to which it has no jurisdiction; and to try the validity of a will of personal estate, as to which also it has no jurisdiction. It is then admitted, that there is nothing to support the bill, unless you can bring it within the case of Atkinson *v.* Henshaw. That case went upon peculiar circumstances, and also upon general principles; and I do not withdraw from this, that where the bill fairly brings forward the question, what is to be done while there is a *lis pendens*, the court will appoint an interim receiver. But this bill does not state such a case. What part of it am I to believe; that which states a suit which has been put an end to, or the loose allegations in another part, that the plaintiff is proceeding to obtain letters of administration. I think the case comes within that of Jones *v.* Jones, before the late Master of the Rolls, and the demurrer must be allowed(*a*).

Genery *v.* Fitzgerald.

Jacob, 468.

Under an executory devise of a residue of real and personal estate, the intermediate rents and profits of the real estate pass, as well as the interest of the personalty.

March 19, 1822.

E. D. FITZGERALD, late of the island of Jamaica, by his will, dated in September 1815, after subjecting his real and personal estate to the payment of his debts, legacies, and annuities, and giving to Sarah Genery an annuity of 600*l.* per annum for her life, and making provision for the maintenance of his reputed children, Edward, Thomas, and William Fitzgerald, during their minorities, proceeded thus: "all the rest, residue and remainder of my estate, real, personal, or mixed, or of what nature or kind soever the same may be or consist, and wheresoever situate, subject as aforesaid, I give, devise, and bequeath the same, and every part thereof, unto the eldest of my said three reputed children, E. F., T. F., and W. F., who shall attain the age of twenty-one years, his heirs, executors, administrators, and assigns for ever, charged and chargeable with the sum of 10,000*l.* sterling money as aforesaid, to each of his brothers, if they or either of them shall attain their said age of twenty-one years, and also with the legacy to my executors hereinafter mentioned, in case they or either of them qualify and act under this my last will and testament." He gave to each of his executors 100*l.*

The testator died soon after making his will. He was seised (subject to a mortgage) of some real estates in the island of Jamaica, with the buildings, the slaves, the cattle, and other stock upon them. The defendant, Thomas Fitzgerald, the brother and heir at law of the testator, claimed to

(*a*) Jones *v.* Jones, 7 Price, 663.

be entitled to these premises, and to the rents and profits subject to the mortgage, until one of the infant sons of the testator should attain the age of twenty-one, and to be absolutely entitled to the equity of redemption in the event of their all dying under that age.

The decree pronounced by the Master of the Rolls, in July 1818, declared that the defendant, T. Fitzgerald, was not entitled to the rents and profits during the minority of the infants: from this declaration he appealed.

Mr Shadwell, in support of the appeal.

Where there is an executory devise of real estate, and the intermediate rents and profits are not disposed of, they descend to the heir at law: Bullock *v.* Stones, 2 Ves. Sen. 521; the rule being different as to personalty: Trevanion *v.* Vivian, 2 Ves. Sen. 430. On the other hand, if, after an executory devise of a particular estate, there is a general residuary clause, it will carry the intermediate rents and profits of the lands first devised. But the question here is as to the interim enjoyment, when the residue is the subject of the executory devise. In Gibson *v.* Lord Mountfort, 1 Ves. Sen. 485, Ambl. 93, a point in some measure similar arose, upon a residuary gift of real and personal estate to trustees, to pay certain annuities and legacies out of the personalty, and the rents and profits of the real estate, and as to the rest and residue in trust for the children that the testator's daughter might have. Lord Hardwicke held, that the heir was excluded, but his reasoning was founded chiefly upon the estate being in the first instance given to the trustees in fee, and upon the testator having by a subsequent clause marked his intention of comprising the rents and profits in the "rest and residue" given to the children. In this case, on the contrary, no trustees are interposed: the devisees will take a legal estate. Nothing is given but the *corpus* of the estate, and that not till a particular period.

The Lord Chancellor. I think this decree is right. The general principles are these. When personal estate is given to A. at 21, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention, that the same rule shall operate on both. Here the property was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together: then is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together? I think it is, and the decree must, therefore, be affirmed.

Reg. Lib. A. 1821, fol. 1303.

Mr Fonblanque, Mr Hart, Mr G. Wilson and Mr Pepys were to have argued in support of the decree.

Lawrence *v.* Smith.

Jacob, 471.

Injunction to restrain the infringement of copyright in a work as to which it appeared doubtful whether it did not tend to impugn the doctrines of the Scriptures, refused.
March 21, 25, 26, 1822.

THE plaintiff had published a work under the title of "Lectures on Physiology, Zoology, and the Natural History of Man." The lectures had been delivered by him at the College of Surgeons. The bill was filed to restrain the defendant from selling a pirated edition, and an injunction was obtained upon motion made ex parte on the filing of the bill. The defendant now moved to dissolve the injunction.

Mr Wetherall and Mr Rose, in support of the motion, argued, that the nature and general tendency of the work in question was such, that it could not be the subject of copyright, and in support of this argument they referred to several passages in it, which they contended were hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul.

Mr Shadwell and Mr Wilbraham, on the other side, denied that the tendency of the work was such as it had been represented. They endeavoured to explain the passages objected to, and to show that they did not bear the interpretation imputed to them.

The Lord Chancellor. This case has been argued with great learning and ability: the principles that must govern me in the decision of it are easily explained. The observations that have been made with reference to the delivery of these lectures at the college of surgeons, I have nothing to do with, for I have no right to deal with the plaintiff's case, until he becomes an author applying for an injunction.

The matter comes on upon a bill, stating that the plaintiff is the author of this work, that the defendant has published it, and that he is therefore entitled to that protection which courts of equity give, beyond the law, to secure to authors the profits of their publications. Our jurisdiction, unless I mistake, is founded upon this; that the law does not give a complete remedy to those whose literary property is invaded: for if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease. This court, therefore, interposes by injunction; but not in cases where an action cannot be maintained.

The party has in general a right to complain in a court of law, and ask for damages to the amount of the injury sustained, and if he can maintain such an action, he may (at least with some exceptions) come here to have his remedy made more effectual. But if the action could not be maintained, nothing can be done in this court, which is only ancillary to the law, and, therefore, will not give relief, except when the law gives damages.

I take it for granted, that when the motion for the injunction was made,

it was opened as quite of course: nothing probably was said as to the general nature of the work, or of any part of it; for we must look not only at the general tenour, but at the different parts; and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but by looking at the different parts, and inquiring, whether there be any which deny, or which appear to deny the truth of Scripture, or which raise a fair question for a court of law to determine whether they do or do not deny it.

The defendant comes into court under singular circumstances. He says, that the work which he as well as the plaintiff has published, is so wrong, so immoral in its nature, that it ought to have no protection. As this court has no jurisdiction in matters of crime, it has been said, that if the injunction be refused, it has the effect of increasing the number of copies. The answer to that is, that I have nothing to do with it as a crime. The question relates only to a civil right of property. If the one party has that right, the other party must not invade it; if he has not that right, the court cannot give him the consequences that belong to it.

Whether, if such a defence were made upon a trial at law, there might or might not be any proceedings of a different nature against both parties, is a question that I have nothing to do with; but the question is, whether it is so clear, that the plaintiff has this civil right, that on that ground he is to have relief? If, on reading the plaintiff's work, I thought it clear that he had that right, I should feel it necessary to state the grounds of my opinion; for after the argument at the bar I should be unwilling to part with the subject without telling you the view I take of it. But if I feel a rational doubt, whether an action would lie, it will not be necessary to go into the grounds of that doubt; it might, perhaps, prejudice the trial if I did. Looking at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided, he may apply again(*a*).

(*a*) See Walcott *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Mer. 435. In Murray *v.* Benbow, February 1822, Mr Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendant from publishing a pirated edition of lord Byron's poem of Cain. The Lord Chancellor, after reading the work, refused the motion on grounds similar to those stated in the above judgment. In a case which occurred before the Vice-Chancellor in 1823, (Lord Byron *v.* Dugdale,) an injunction which had been obtained to restrain the publication of a pirated edition of a portion of the poem of Don Juan, was dissolved on similar principles. His honour ordered that the defendant should keep an account.

The Attorney-General *v.* The Dean and Canons of Christ Church.

Jacob, 474.

Devise to the dean and canons of Christ Church in trust to constitute and support a grammar-school at P., to appoint a master and usher, and pay them certain salaries, and the dean and canons to direct the management of the school. Held,

1. That the school was to be a free grammar-school for teaching the learned languages.
2. That the proper objects were the children of the resident inhabitants of P.
3. That they must be the children of protestants, and must be educated according to the principles of the Church of England.
4. That the master might take boarders and day-scholars.
5. That the number of free-scholars was to be limited, and in fixing the number the court was guided by the amount of salary originally provided.
6. That the free scholars were to be nominated by the trustees.
7. That the trustees were to visit the school at their discretion, and to be allowed their reasonable expenses.
8. An augmentation of the salaries of the master and usher made by the trustees, upon an increase of the income of the charity, not allowed to them, the school, through error, not having been devoted to the proper objects.

March 30, August 6, 7, November 26, 1821; March 28, 1822.

W. SMYTH, M.D., by his will, dated in 1732, devised a freehold estate to the dean and canons of Christ Church, Oxford, and their successors for ever, "in trust, that the said dean and canons, and their successors, should constitute and support a grammar-school in the borough of Portsmouth, in the county of Southampton, in manner following; (that is to say) that they, the said dean and canons, and their successors, shall appoint a master and usher to the said school, and pay unto the said master yearly and every year the sum of 50*l.*, and to the said usher the sum of 30*l.* of lawful money of Great Britain. And I do hereby order that the said dean and canons shall, from time to time, order and direct the management of the said school." The testator died soon after making his will.

The present information was filed in the year 1811, for the purpose of establishing the charity. The dean and canons in their answers stated, that they had, about the year 1750, built a school-house, and had applied the rents to the maintenance of a master and usher, whose salaries they had increased to 80*l.* and 60*l.* in consequence of an improvement in the value of the property; they contended that it was not the intention of the testator to have a free grammar-school established, but that he intended that there should be a school for the advantage of the town, by having proper persons to act as master and usher, and that the scholars were to be educated as they had hitherto been, at the expense of their parents and friends.

By the decree, dated the 6th of December 1815, it was declared, that it was the intention of the testator to constitute and support, out of the charity funds in question, a free grammar-school in the borough of Portsmouth, and it was referred to the master to take an account of the rents and profits of the charity estates, from six years previous to the filing of

the information, and to approve of a scheme for carrying the charitable intentions of the testator into execution. The master having approved of a scheme, made his report, to which several exceptions were taken by the relators, and one by the defendants.

The second exception of the relators was, that the master had allowed to the defendants the payments of the salaries of the master and usher from the year 1805, at the rate of 80*l.* and 60*l.*, whereas those payments ought not to have been allowed at all, or at the rate of more than 50*l.* and 30*l.* per annum, according to the will. The master found that the revenue was about 220*l.* per annum, and it was a part of the scheme to which no exception was taken, that the salary of the master should in future be 100*l.* per annum, and that of the usher 60*l.*

Mr Wetherall and Mr Pepys, for the relators, contended, in the first place, that the master and usher, not having been appointed to perform the duty intended for them by the testator, not having taught gratuitously, the sums paid to them ought not to be debited to the charity; and that, at all events, the salaries ought not to have been increased without the authority of the court, particularly while the duties of the offices were neglected.

Mr Wingfield and Mr Phillimore, for the dean and canons of Christ Church, insisted, that their having mistaken the nature of the institution was not a ground for charging the trustees with a misapplication. As to the increase of the salaries, it was called for by the increase of the revenues. It is not disputed that the increase was proper, for still larger salaries are now proposed without objection. If an application had been made to the court, it would have devoted the surplus to this purpose. The dean and canons were entrusted with the entire management, and they cannot be made answerable, because, to avoid the expense of a suit, they have done without the authority of the court, that which the court, if applied to, would have ordered them to do.

The Master of the Rolls stated the circumstances of the case and observed, that from the decree it must be taken that the court was of opinion, that the interpretation put upon the will by the defendants from the commencement of the charity was erroneous. The testator having desired the erection of a grammar-school, the court construed that to mean a free grammar-school. The defendants, however, had thought, that they did their duty in erecting a school and appointing a master, not going far enough, in not accompanying it with directions as to the education of free scholars.

With respect to the salaries, the first question is, whether the dean and canons are to be responsible for the amount of them, as having paid them without appointing persons to do the duty for which they were to be paid. If it was the intention of the testator that persons should be paid for instructing gratuitously, and they have employed the funds in the support of persons appointed not for that purpose, but for the purpose of keeping a school without free scholars, unquestionably this was not in strictness authorized by the will. But it is another question, whether the court is to visit them penally by making them refund; for they certainly did pay the salaries to the master and usher. The fault was not in paying them, but in not directing them to do their duty; not in what they did, but in what they did not do. They did not complete and fulfil the intention of

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the testator, from misapprehension of words that might fairly mislead them.

I think, therefore, that the payments ought not to be called back; but the question is very different with respect to the augmentations. I feel a difficulty in sanctioning what was an excess of the trust. The founder had fixed certain salaries; what was beyond that was to be applied to other purposes; and it would be dangerous to hold out to trustees a latitude of giving more than the founder has fixed. They were to have the management of the school, but that did not give them authority to transgress the limit that was fixed. If there was a surplus, it should have been expended for the benefit of the scholars, in providing them with books, paper, and other necessary articles; and if after that there was still a surplus, a scheme should have been laid before the master for its application. They ought not to have taken upon themselves to apply it thus, without power given by the will, and without the authority of the court. To be sure one could not expect to find a man of learning to teach for so small a sum as the original salary, and it is, therefore, easy to account for their thinking the increase necessary, but it was a mistake to suppose that they had this power. It would be too much for the court not only to allow the amount of the original salaries, but also to allow them to take nearly double without doing any thing. The exception must be allowed as to the increase(*a*).

The third exception was, that according to the scheme approved by the master, the boys to be educated at the school were to be born of parents residing within the borough of Portsmouth, professing the protestant religion, according to the established church of England; whereas no qualification but that of being natives of the borough of Portsmouth should have been required; the education of the boys in the principles of the church of England being provided for by other rules.

The fourth exception was, that the scheme limited the number of free scholars to fifty, and permitted the master to take as many boarders and day scholars as he should think fit, upon such terms as he and their parents might agree on; the relators contended that the number of free scholars should be one hundred, and that no boarders or day scholars should be allowed, or only a small number. The defendants also took an exception to this part of the report, contending, that the master ought only to be required to take forty free scholars.

The fifth exception related to the nomination of the free scholars. The scheme proposed that they should be nominated by the dean and canons, upon the recommendation of the master of the school, the vicars of Portsea and Portsmouth, or their curates, and the mayor of Portsmouth, the vicar of Portsmouth to have the casting vote, in case of an equality. The relators insisted that the boys should be nominated alternately by the vicars of Portsmouth and Portsea, and by the mayor of Portsmouth.

The sixth exception was, that writing and arithmetic were not included in the branches of education to be taught gratuitously.

(*a*) The defendants appealed to the Lord Chancellor from the order made by the Master of the Rolls upon the second exception, by which the augmentations of the salaries of the master and usher were disallowed to the defendants. The Lord Chancellor reversed the order so far as it related to the second exception, and ordered that that exception should be overruled; and the amount of the sums so disallowed having been paid into court by the defendants, was ordered to be paid out to them. 6th July 1826.—Reg. Lib. A. 1825, fol. 1762.

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The seventh exception was, that according to the scheme, upon all occasions of appointing boys to fill up vacancies among the free scholars, the dean and canons, or some proper person to be appointed by them, were to be present, and inquire into the state and condition of the school, and into the conduct of the master and usher, and all persons connected with the management thereof, and should enter in a book, to be kept for that purpose, the result of such inquiries, in order that, if any abuses were found to exist in or about the management of the school, the same might be rectified, and that all proper and necessary expenses incurred by the dean and canons of Christ Church, or other person who should attend upon such occasions, in going to and from Portsmouth for the purposes aforesaid, should be paid out of the charity estates: whereas the master ought to have certified, that the duty of superintending the school should be left to the dean and canons, so that the expenses incident thereto should not in any one year exceed 10*l.*

For the relators.

The proposed scheme confines the benefit of the charity to boys whose parents profess the religion of the church of England There is no ground for this restriction: the will furnishes no indication of an intention to impose any religious disqualification. It is provided by other parts of the scheme, that the children shall be brought up in the established religion, and if any exclusive intention in favour of the church of England could be inferred, those provisions would be sufficient to satisfy it. The scheme makes the religion of the parent, and not that of the child, the criterion of eligibility. But if the child conforms, why should any thing further be required? At the universities and public schools, the students are admitted without inquiry as to the religion of their parents.

The scheme also restricts the charity to boys born of parents residing in the town: this will exclude those who may have been born there, if their parents afterwards remove, and, if strictly construed, those whose parents are dead.

The master should not be permitted to take boarders; he cannot consistently with the duties he owes to the free scholars, devote himself to the instruction of others. In the Attorney-General *v.* The Cooper's Company, 19 Ves. 197, it was laid down by the Lord Chancellor, that boarders were not to be allowed, if they interfered with the care and attention which the master ought to bestow upon the free scholars. In so populous a town as Portsmouth, the school is likely to be always full, so as not to afford much leisure, and it is only his leisure time that the master can properly employ upon other objects. The design of limiting the free scholars to so small a number, is only to make room for boarders, and to give the master time to instruct them; but his emolument is not the object to be considered; the benefit of the town is alone to be consulted; and, therefore, all the children, who are otherwise qualified, should be admitted. We have proposed to limit the number to one hundred, the present school-room not being able to contain more; but, in strictness, there ought to be no limit, the founder having made none. With respect to the power of nomination, we propose that it should be vested in persons who are the most likely to be acquainted with the proper objects. The master ought not to be allowed to interfere in it; the interest he has to reduce the school makes him justly an object of jealousy. To add instruction in writing and arithmetic to the scheme will greatly increase the utility of the institution. The mode of visitation proposed is too expensive; it will not be necessary to

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require that it shall take place periodically, but it should be left to the discretion of the trustees to inspect the school, as occasion requires, taking care that it shall not put the charity to any unreasonable expense.

For the defendants.

In the absence of any declared intention, the court will presume a purpose favourable to the established church : in the principles of which it is admitted that the children are to be educated ; and this presumption is strengthened by the circumstance of the testator having confided the management to a clerical body, giving them the power of forming the regulations and selecting the objects. In the Bedford charity case, 2 Swanst. 470, it was held by the Lord Chancellor, that the children of Jews were not entitled to claim admission to the school, or to participate in the other benefits of that foundation. The admission of boarders cannot be objected to, unless it be found to divert the master's attention from the objects of the school, which the court will not anticipate. It was so decided in the Attorney-General *v.* Lord Clarendon, 17 Ves. 491 ; Attorney-General *v.* Hartley, 2 Jac. & Walk. 353. The number of scholars ought not to be very large, or the task of instructing them would be beyond the power of a master and a single usher. It is unreasonable to expect them to teach an unlimited number for moderate salaries; and if, in addition to this, they are precluded from other sources of emolument, it will be impossible to find persons properly qualified, who will accept such laborious and unproductive offices. The power of nominating the boys ought to be in the dean and canons, the founder having entrusted the whole government of the school to them. Being expressly founded as a grammar-school, the education must be confined to the learned languages. Attorney-General *v.* Whiteley, 11 Ves. 241.

The Master of the Rolls. The court is placed in considerable difficulty from not having the testator's intention more clearly defined, from the absence of all directions, except that a grammar-school is to be established at Portsmouth. The dean and canons of Christ church are to manage it, but nothing is said about the details. All the rest is conjecture or implication, and it cannot therefore be assimilated to the cases where particular directions have been given as to different points. The dean and canons certainly formed an erroneous notion of the nature of the trust ; they imagined that all they had to do was to build a school and appoint a master and usher. They have proceeded on that idea, intending, no doubt, to carry the trusts into execution. It is not suggested that the master and usher appointed by them were improper persons, and I do not mean to impute to them any intentional violation of the trusts, but according to the construction which the court has put on the will, they have not executed them. The founder had provided means for procuring persons to give instruction in the learned languages, and though there were no words importing gratuitous education, the court considered that to be a necessary implication from the nature of the foundation. We must, therefore, now assume it to be a free-school : not having been originally treated so, the place has unfortunately lost the benefit that was intended for it. However, though the court thought that the defendants were not justified in adding to the sums given by the testator to the master and usher when the purposes he contemplated were not fulfilled, yet the account is only directed for six years, and is confined to the excess of the salaries. The defendants increased them, although they had no power to do so without

the authority of the court, and although no gratuitous education was provided as intended by the testator.

On the points involved in the remaining exceptions, the court has no guide furnished by the will, excepting in this, that the school is to be a grammar-school. What this is, is perfectly understood ; it is a school for education in the learned languages. If there were any doubt upon the point, the construction put on the words grammar-school in the case of the Attorney-General *v.* Whiteley, 11 Ves. 241, would be decisive. There it was much pressed upon the Lord Chancellor, and it would have been very desirable that part of the funds should have been employed on other objects, more fit for the inhabitants of a commercial town. But it was not in the power of the Lord Chancellor to alter it, and introduce any thing not according to the nature of the foundation. So in this case, the school certainly cannot be extended beyond the terms of the will. Whether it will or will not be most useful in that shape, I have not to consider. One feels that it limits very much the extent of the bounty to the lower orders : gratuitous education in the dead languages, without instruction in reading and writing, is in general of little use to them. Still, whatever it is, they must have the benefit of it.

I feel considerable difficulty in fixing the number of free scholars to be admitted. I think we must not make it unlimited, for it is not reasonable to suppose that that could have been the intention of the founder : even at the time of his making his will, a competent person could not have been found to instruct an unlimited number for the salary that was provided. There must be some reasonable limit, and if there is nothing else to guide us, the quantum of the pay must determine the quantum of labour. The size of the school-room cannot be the proper criterion ; for it was not built till some years after the donor's death. The difficulty is, how the court is to decide what is a reasonable number to be taught in return for the salary.

When the number of free scholars is ascertained, I think all the cases authorize the court in saying, that the schoolmaster may unite with the gratuitous education of those scholars, another object not necessarily incompatible with it, namely, stipendiary education of others. It is true that many arguments may be urged against it, on the ground of one object tending to relax the exertions of the master on the other. But still it is to be remembered, that by offering great emoluments, you obtain a more competent master, better able to instruct those who are taught gratuitously ; and it is evident from what we see in the public schools, that elemosynary and stipendiary education may be combined, to the great advantage of both. Attention must always be paid to the school, to see that the master does his duty to the free scholars. The trustees must take care that he does not neglect them for the sake of attending to the boarders.

One exception applies to the description of the persons whose children are to be received in the school, and first, with reference to their religious principles. It is admitted on both sides, what is to be the nature of the school. It is founded by a protestant ; it is to be a grammar-school; and in the absence of other evidence, the court can only establish it on the principle of religious education forming a part of the plan, and that religious education being according to the law of the land. On that both sides are agreed. Then the question is whether scholars are to be admitted, without regard to the religion which their parents may profess. Certainly, I should not be desirous to establish any narrow-minded restric-

tions; but as we are to regard the benefit of the children, I think that, considering the intercourse that must take place between them, and the influence it may have upon their habits and principles, which it is of importance to preserve, and that they are to be received at all ages, from seven to seventeen; it will be very reasonable to say, that the parents must be persons professing the Christian religion, and protestants; further than that I do not think I ought to go.

With respect to requiring that the parents should be natives of the town of Portsmouth, that alone would not answer the purpose, for natives of the town may be residing elsewhere. The resident inhabitants of the town are the persons naturally entitled to the benefit. They must be the children of resident inhabitants; it does not require more minute detail as to the quantum of residence necessary to entitle them.

As to the nomination of the boys; it is contended on the one hand, that they should be named by the dean and canons on the recommendation of the master of the school, the vicars of Portsea and Portsmouth, and the mayor of Portsmouth; on the other hand, it is said that the master should not have a voice in the recommendation. Here again there is no guide in the will. What allusion is there in the will to the mayor or the vicars? They are introduced upon some conjecture, or upon some notion of policy. But I do not feel myself at liberty to speculate on these subjects. The testator has given the direction and management of the school to the dean and canons; and they are therefore the persons to nominate and appoint the scholars; and I do not know how any restrictions on their power can be introduced. Is it not part of the management to nominate and send to the school the persons who are to be educated?

As to the visitation, I think all these provisions about it should be laid aside. The proper way is to leave it to the trustees without directing any particular mode of visiting. They must generally superintend the school, and perform the duty *bonâ fide*. They will then be at liberty, like any other trustees, to charge the expences fairly incurred in the execution of their trusts. There is no occasion for any limitation as to the amount of expense to be charged; nor for the visitations to be annual, much less for them to be made whenever a boy is appointed. The appointment of the boys, and the visitation of the school, must be left to the dean and canons generally.

Nov. 26.—The Master of the Rolls. The only remaining question is, whether I am to allow either of the exceptions which have been taken with respect to the number of free scholars, or what course I am to take with reference to that point. The terms of the will direct the foundation of a grammar school at Portsmouth, without saying any thing as to the education being gratuitous, or as to the number of scholars. But the court considered, as the master and usher were to receive salaries, that the school must have been intended to be free to the inhabitants of the town, to a certain extent. The question then is, what is to be the number of free scholars? as to which the salary is the only guide: the founder probably had not any very precise notion on the subject.

It could not be supposed, that for 50*l.* per annum a man of learning could be found to devote the whole of a laborious life to the painful employment of elementary teaching. I think every thing dictates that there must be some limit. No guide being furnished by the will to show what the limit should be, we must go back to the date of the will, and consider

what was then to be the quantum of salary. In 1732, the master was to have 50*l.* per annum. Now at that time, how much would a boy have paid him for teaching the learned languages? surely not less than 1*l.* each; and, therefore, the number for which that salary would be a recompense would not be more than fifty.

If in aid of this income he be permitted to take boarders who are to pay, a competent master may be procured, and there is also the advantage of competition among the boys. The question of allowing boarders to be admitted, has often been before the court, and it has not been considered incompatible with the education of the free scholars. For the sake of those whom he is to teach, we must seek for some other benefit for the master; he ought not for a limited salary to be precluded from this advantage.

I feel very great difficulty in fixing the number of free scholars, and I wish that the parties could have relieved me from it by agreeing about it; but under all the circumstances, I cannot say that the master has not done right. I think fifty a very reasonable number to be educated for that salary in the year 1732. It is not necessary to limit the number of boarders; but they must not be so many as to disable the master from taking fifty free scholars, nor so many as to be inconsistent with that which is to be the primary object; and the master must not for their sake withdraw his attention from the free scholars.

The cause was mentioned again upon a motion to vary the minutes; the questions made were, whether the qualification required was that the boys should be resident inhabitants of Portsmouth, or that they should be the children of resident inhabitants; and whether the children of persons not of the church of England were to be admitted.

The Master of the Rolls. As to the first point, I think the residence of the parents, and not of the children, must be looked to as forming the qualification. They must be the children of resident inhabitants, or of persons who were such at the time of their births: and it is well known to the law what constitutes a resident inhabitant. It must not be extended to all natives, as that would comprehend a child whose parents might, by accident, be in the town at the time of its birth.

With respect to the second question, I meant only to require that the boys should be the children of protestant parents, considering that sufficient, as they are to be educated according to the principles of the church of England; and if any other protestants are willing to send their children where they will be so educated, there is no objection to it. It is the same at the universities and public schools, protestants being admitted, without inquiring what particular sects they may be of.

It was declared that the defendants ought not to be allowed any sums for the salaries of the master and usher beyond the annual sums of 50*l.* and 30*l.*: that the boys, whom the master of the school should be required to educate, should be children of resident inhabitants of the borough of Portsmouth, or the children of persons who were resident inhabitants of the said borough at the time of the birth of such children, in cases where the parents are dead, being the children of persons professing the protestant religion; that the boys to be educated gratuitously at the said school ought to be nominated by the dean and canons of Christ Church: and that the

[Attorney-General *v.* The Dean and Canons of Christ Church.]

scheme for the regulation of the said school ought not to contain any provision for the visitation thereof, but that the duty of superintending the said school ought to be left to the dean and canons of Christ Church; and it was referred back to the master to review his report.

Reg. Lib. A. 1821, fol. 699.

Mole *v.* Smith(*a*).

Jacob, 490.

An attendant term having become vested in the wife of the owner of the inheritance as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for a specific performance of the agreement, pending which suit the husband dies: Held, that the widow was not entitled to dower, that she was bound to assign the term to the purchaser, and that he was bound to accept the title.

Bill by vendor for a specific performance, and praying against third persons claiming an interest in the estate, that they may join in the conveyance to the purchaser, multifarious.

A decree for a reference of title on a bill for a specific performance should contain a declaration that the contract ought to be specifically performed.

Husband and wife being defendants to a bill praying an assignment of a term, which the wife by answer claims to hold to preserve her title to dower, on the death of the husband the suit may proceed without a supplemental bill. *Semble.*

March 19, 23, 28, 30, April 4, 1822.

THIS cause came on to be heard before the Lord Chancellor, upon exceptions taken to the Master's report approving of the title, and upon further directions: a supplemental bill had been filed against the defendant, Mrs Watson. The state of the title so far as relates to the question of dower was as follows:

A. G. Onslow was, in 1801, seised in fee of eleven-thirtieth parts of certain estates in Bamborough, subject to three satisfied mortgage terms of 500, 2000, and 2000 years, which had been created by indentures, dated respectively the 19th of August 1758, and the 13th of July 1780, and which were vested in W. Baird, as a trustee for him. Onslow having sold the premises to W. Watson, conveyed them to him in fee by indentures of lease and release of the 11th and 12th of May 1801. By indenture of the 14th of that month the three terms were assigned by Baird to Adam Yelloly, in trust for Watson, his heirs and assigns, and to attend the inheritance.

In May 1802, Watson conveyed the premises to John Ord in fee by way of mortgage for securing 5000*l.* and interest; and in the mortgage deed it was declared, that all persons in whom any satisfied terms were then vested should stand possessed thereof upon trust, to be disposed of as Ord, his heirs, executors, administrators and assigns should direct, for better securing the sum of 5000*l.* and interest, and subject thereto in trust for Watson, his heirs, and assigns, and to attend the inheritance.

In the year 1803 Watson filed a bill for a partition against the persons entitled to the other nineteen-thirtieth shares, and a decree for a partition having been made, and the commission executed, indentures of lease and

(*a*) See 1 Jac. & Walk. 665.

release of the 29th and 30th of April 1808 were executed, by which a part of the estates (being the premises in question in this cause) having been allotted to Watson in severalty, was conveyed to Ord, his heirs and assigns, subject to the equity of redemption of Watson; and it was declared, that Yelloly should stand possessed of the three terms upon trust for the persons who, for the time being, should, under the limitations therein contained, be entitled to the reversion and inheritance, and to be assigned as they should direct, and in the mean time to attend the inheritance.

The bankruptcy of Watson took place in 1810, and on the 24th of September in that year, the premises were agreed to be sold by the plaintiffs, his assignees, to the defendant Smith. By the agreement Smith was to be let into possession from the 11th of November following, and the purchase was to be completed on or before the 12th of May 1811. In January 1811 the plaintiffs paid off the mortgage to Ord, and took a conveyance from him. At the time of the purchase of the estate in 1801, Watson was married; his widow was now possessed of the three terms, as one of the sisters and surviving administratrix of Yelloly, who died previous to the issuing of the commission of bankrupt.

The defendant Smith, by his answer said, that he was willing to pay his purchase-money upon having a full and complete title made out, and a conveyance from all necessary parties; but he said, that as the title was insufficient, the plaintiffs were not entitled to a specific performance, and he had, therefore, refused to complete the contract, on account of the claim to dower, and also, because no sufficient title was shown to the tithes which formed part of the purchase.

Mr Hart and Mr Sugden, for the plaintiffs.
Mr Horne, Mr Shadwell and Mr Preston, for the defendants(*a*).

March 19.—The Lord Chancellor intimated a desire to have the question, whether the defendant Smith could now be compelled to complete the contract, if a good title could be made, argued before giving his judgment on the question of dower.

Mr Horne, for the defendant Smith, contended that whatever might be the ultimate decision as to the widow's right to dower, the contract was no longer binding, no good title having been shown at the time of the Master's report. The bill was singularly framed, in joining with the purchaser as co-defendants other persons claiming an interest adversely. The plaintiffs thus admitted that the title was subject to a question requiring the decision of the court; during the pendency of the suit against the widow, they could not, therefore, make a title, and, at the date of the report, that point was undecided; indeed a supplemental bill has become necessary for the purpose of having it settled. The completion of the purchase may thus be indefinitely protracted beyond the date of the report, which is the usual limit, in order to abide the decision of questions raised between the vendors and third persons.

Mr Hart, on the other side, observed that the defendant might perhaps have objected to the bill as being multifarious, in mixing his case with that of another, but that having submitted to perform the agreement upon a title being made, and having continued in possession, he could not now

(*a*) The editor was not present during the argument.

object if the decision should be in favour of the plaintiff's title; the consequence of that would be, that the Watsons ought to have conveyed; and a purchaser could not be discharged from his purchase on the ground of a trustee improperly refusing to join in the conveyance. He also argued, that the supplemental bill was unnecessary.

March 28.—The Lord Chancellor. The Master of the Rolls, I understand, was of opinion that it was necessary that the supplemental bill should be filed; with great deference to him I should have doubted that. The answer put in to the original bill, was an answer claiming for the widow the benefit of everything that she could possibly claim. She is brought before the court in a suit for a specific performance, and, as Mr Hart said, the bill might have been demurred to for multifariousness, but you cannot now object on that ground.

March 30.—The Lord Chancellor. The bill, after stating the commission of bankrupt under which the plaintiffs are assignees, and their agreement to sell to Smith, introduces a statement, which has been commented on, and which I think may fairly be said to render it multifarious; namely, that the three terms had become vested in Mrs Watson, and that she claimed to be entitled to dower in the event of surviving her husband. I apprehend that when a bill is filed for a specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate. If there was a title in other persons that the plaintiffs were bound to get in, they should have filed a bill for a specific performance only, and should have fortified the defects of their title by such mode as they could, so as to be able to complete it by the time when the contract would be to be enforced. But no objection is made on this head. The purchaser puts in his answer, saying that he is willing to complete the contract upon having a title made out.

The decree is then made, and it appears to me that it must be taken by implication to import, that if the plaintiffs could make a good title, the defendant was bound to take it. If for any reason he was not bound to take it, the bill ought to have been dismissed. If I had made the decree myself, I should have declared specifically that he was bound to perform the contract, or that he was not; and decrees generally contain such a declaration: but I look at this decree as an expression of the opinion of the court, that, under the circumstances which came before it, he was bound, and that if, for the purpose of completing the title, it was necessary to get in these terms, that he was nevertheless bound. I think, however, that the decree should have contained an express declaration of that which I take to be implied in it. The parties appear to have acted on this notion, the possession having been retained by the defendant, and an order having been made so late as 1820, noticing the possession and mode of enjoyment.

The form of the inquiry directed by the decree was, whether the plaintiffs could make a good title, and if so, then whether Mrs Watson was entitled to dower; which rather seems to imply that the right to dower was not an objection to the title: yet it would be difficult to say, that where an estate is sold free from incumbrances, and another person is entitled to a third part of it for life, that that is not an objection to the title. The Master reported that a good title could be made, and that Mrs Watson was not entitled to dower; as to which it is to be observed that it is a

very different thing to say that she is not entitled to dower at all, and to say that she is entitled with a *cesset executio* during the term.

The cause then came before the Master of the Rolls, and Watson having, in the mean time, died, his honour thought it necessary that Mrs Watson should be brought upon the record in a different manner, having been made a party, as the wife of Watson, and her title, if any, being now in her own right. He thought, that another proceeding ought to be had, to enable her to claim, in her own character, what she had before claimed as wife. I should have been inclined not to have done that, for it would be difficult for her in her other answer to state it differently from the first.

One question that arises is, whether the purchaser is now bound by the contract; and, I think, that all along he has been going on in such a manner that he cannot now object to take the estate, provided a good title can be made to it.

That introduces the question upon the claim to dower; a point of great importance. It is not necessary to go through the various cases, Radnor *v.* Vandebendy, Show. P. C. 69, Prec. Ch. 65; Swannock *v.* Lifford, 2 Atk. 208, Ambl. 6, Co. Litt. 208, a. n., and Willoughby *v.* Willoughby, 1 T. R. 763, in which the doctrines of the court, as to attendant terms, are laid down. The result of them may be thus stated. When there is an old term that is satisfied, the inheritance being the estate, the interest in the term attends upon it: if there be a first, second, and third mortgagee, they are, according to their respective gradations, entitled to the benefit of the term. It is possible that some of them, or all of them, may not know of its existence: and according to the practice of conveyancers, sanctioned by, and, perhaps, growing out of the doctrines of this court, if a subsequent incumbrancer, without notice, gets in the term, he gains a priority; if, at the time of advancing his money he had notice of the previous incumbrances, he does not gain priority. If, upon grounds that are not extremely conclusive, it is now to be held, that terms are surrendered because they are satisfied, there will be an end of all that the court has been doing upon this subject for a long time past.

As to dower there is this difference. If a person purchases an estate, on which there is an old term, then, although he has notice that the vendor is married, and that his wife will be entitled to dower, and, although the term is attendant on all interests in the inheritance, and, therefore, on the wife's right to dower as well as the rest, yet, if he obtains an assignment of the term, the wife's right is barred. Lord Hardwicke in Willoughby *v.* Willoughby, carries it further, saying, that it will be sufficient if the purchaser possesses himself of the deeds creating the term, so that no use can be made of it against him. 1 T. R. 772. Several reasons have been assigned for this. It is difficult to say which is the best; but such is the law.

The question comes to this, whether this lady is entitled to dower; and, before I decide it, I wish to know in whose hands the original deed creating the terms are. The terms ride over other estates besides these; and I understand that the inheritance has passed through the hands of several purchasers, and that these deeds are not in the possession of the assignees, and were not in the possession of Watson. I wish to know whether I am correct in this.

The question will then be, the assignees being entitled to sell the inheritance, whether the circumstance of there being a term subsisting, and if not, whether her being the trustee of the term, would make a difference.

[Mole *v.* Smith.]

The strong inclination of my opinion is, that if she would not have a right to dower, if the term were vested in another person, the circumstance of it being vested in her will not give her that right.

April 4.—The Lord Chancellor said, it appeared that the deeds were in the possession of a Mr Robinson, and not of the assignees. The terms, as far as they affected these premises, were assigned upon Watson's purchase to Yelloly, in trust for him, and to attend the inheritance: the effect of that would be that if Onslow was married, the assignment would prevent his wife from being entitled to dower.

The question comes to this: It is clear, that if Watson himself had sold the estate, and received the value, he could have compelled his trustee to assign the term to a trustee for the purchaser. Then, do these two circumstances make a difference: first, that he had become bankrupt, and the sale was by his assignees; secondly, that by the death of Yelloly the wife had herself become trustee of the term? Can she, under these circumstances say, that she is not compellable to assign for the protection of the purchaser?

But it does appear to me, that it would be singular, if, because the ordinary grants administration to her, when he might have granted it to her sister, or to some other person, she is to stand in a better situation. On the best consideration that I can give to it, I cannot think that it ought to make any difference. On the other point, I think the assignees have the same right as the husband would have had; she is now a trustee for them, and is bound to convey.

The purchaser, I think, is bound to perform the contract, though it seems to me, that there were periods when, if he had pursued a different course, he might have got off.

His lordship doth declare that it appears, that upon the sale to the late defendant William Watson, the husband of the said defendant Dorothy Watson, of the inheritance of the premises contracted to be sold to the defendant G. Smith, by the assignees of the late defendant W. Watson, and in which premises the said Dorothy Watson has claimed dower, the several terms of 2000 years, 2000 years, and 500 years, were assigned to Adam Yelloly in the pleadings mentioned in trust for the said W. Watson, his heirs and assigns, to attend the inheritance; and that if the said W. Watson had thought fit before his bankruptcy, and in the life-time of the said Adam Yelloly, to contract to sell the said estate to the said defendant G. Smith free from incumbrances, he might, to enable him to carry such contract into complete execution, have required the said Adam Yelloly to assign the said terms to a trustee for the purchaser; and that such purchaser, if entitled to the benefit of the contract, would have been entitled to call for an assignment of the said terms, in order to protect himself by such terms against the claim of the defendant Dorothy Watson to her dower during the continuance of the said terms; and that as the said W. Watson during the coverture became a bankrupt, his assignees were entitled to sell his estate as fully for the benefit of his creditors as before the bankruptcy he could have sold the same for his own benefit: and that the said defendant Dorothy Watson, as administratrix of the said Adam Yelloly (although also the wife of the said W. Watson, in his life-time, and since his widow), is not entitled to make any use of the said terms vested in her as such administratrix to enable her to enjoy her dower,

which she could not have compelled the said Adam Yelloly to make for her benefit if he had continued in life: and that the assignees of the said W. Watson having contracted for themselves and all other persons having any estate or interest in the premises, to sell the same to the said defendant G. Smith, free from incumbrances, are bound to procure an assignment of the terms to the said defendant G. Smith, at the time when they call upon him to accept a conveyance of the inheritance of the estates, and are not entitled to require him to accept the estate subject to dower, to be enjoyed before the expiration of the said terms. But his lordship doth declare also, that as the said Adam Yelloly, whom she represents would, if living, have been compellable by the said assignees to assign the said several terms to a trustee for the said defendant G. Smith, in order to carry their contract of sale and purchase with him into execution, the said defendant Dorothy Smith is also compellable to assign the said several terms. And his lordship doth order that the exceptions be overruled, and that the sum of 5*l.* deposited with the register on filing the said exceptions, be paid to the plaintiffs. And it is ordered that the said master's report, bearing date the 8th of December 1818, certifying that the said Dorothy Watson is not entitled to dower, do stand absolutely confirmed. And his lordship doth declare, that the said report is to be understood, as stating that she is not, during the continuance of the said several terms, or any of them, entitled to enjoy dower. And it is ordered that the said report be confirmed, as stating that the plaintiffs can make a good title to the estate and premises in the pleadings mentioned. And it is ordered, that the agreement for the sale and purchase in the pleadings mentioned, bearing date the 15th of October 1810, be specifically performed and carried into execution. And it is ordered, that it be referred to Mr Cross, one of the masters of the court, to whom this cause stands transferred, as vacation master, to compute interest on the sum of 14,962*l.* 10*s.*, being the balance of the purchase-money of the estate and premises in the pleadings mentioned, at the rate of 4*l.* per cent per annum, from the 11th of November 1810, at which time the said defendant G. Smith entered into the actual possession and enjoyment of the said estate and premises, pursuant to the aforesaid agreement, to the 12th of February 1821, at which time the said defendant G. Smith paid the said balance of the purchase-money into court. And it is ordered, that what the said master shall find to be due for such interest be paid into the bank, with the privity of the accountant-general of the court, to the credit of this cause, by the said defendant G. Smith, subject to the further order of this court. And it is ordered, that the inheritance of the said estate and premises be conveyed to the said defendant G. Smith, as the master shall direct, in case the parties differ about the same. And it is ordered, that the said defendant Dorothy Watson do assign the several terms of 2000 years, 2000 years, and 500 years, to a trustee for the said defendant G. Smith, to protect his inheritance, as the master shall direct, in case the parties differ about the same. And it is ordered, that it be referred to the master to settle the conveyances of the inheritance of the said estate and premises, and of the said terms, to the said defendant G. Smith and his trustee, in case the parties differ about the same. And his lordship doth reserve the consideration of the costs of the cause, until an inquiry has been made respecting the delivery of the abstracts and the time when delivered, so that it may be shown when a good title was first made to the said defendant G. Smith. And it is ordered, that it be referred back to

[Mole *v.* Smith.]

the master to make the said inquiry. And any of the parties are to be at liberty to apply to this court as they shall be advised.

Reg. Lib. B. 1821, fol. 1726.

Moses *v.* Lewis.

Jacob, 502.

Special injunction to restrain proceedings in ejectment between two defendants refused where the plaintiff as landlord might have made himself defendant at law.

April 27, 1822.

MR HEALD and Mr Knight moved *ex parte* upon the filing of the bill, and upon affidavit for an injunction to restrain the defendant Lewis from taking out execution upon a judgment in ejectment obtained by him against the other defendant Jones. The case made was, that the defendant Jones was in possession under an agreement, as tenant to the plaintiff; and the defendant Lewis had recovered against him, by means of an award, which the bill sought to set aside.

The LORD CHANCELLOR asked when the plaintiff had notice of the ejectment, and on finding that he had known it at an early stage of the action, said that he should have applied for leave to defend it. Every landlord may make himself defendant to an ejectment brought against his tenant. The plaintiff might have made himself defendant by rule of court, and then he might have filed his bill stating this case, and praying an injunction, for this court would treat him as the substantial party. But in that case he could only have the injunction upon the ordinary terms, upon non-appearance or for default of answer. Here he has been lying by: if he had filed his bill before, the other party might by this time have put in his answer, and perhaps have shown that there was no equity. It would lead to this practice: that the landlord, if convenient to him, would not make himself a defendant to the action, but would wait till it was over, and then apply for an injunction upon affidavit.

Motion refused.

Dickson *v.* Robinson.

Jacob, 503.

Testator gives his real and personal estate to his wife in trust for the equal benefit of herself and her children.

She is bound to elect between her dower and the provision made for her by the will.

Rolls—April 30, 1822.

JAMES ROBINSON, by his will, dated in February 1817, gave and devised all his real and personal estate to his wife, her executors, adminis-

trators and assigns, to hold the same in trust for the equal benefit of herself, his two daughters Elizabeth and Frances, and the child or children of which his wife was then pregnant. He died soon after making his will: the bill prayed (*inter alia*) the execution of the trusts; and the only question at the hearing was, whether the plaintiff, the testator's widow, was entitled to claim dower out of his real estates, as well as the provision made for her by the will.

Mr Wray, for the plaintiff.

Mr Koe and Mr Purvis, for the defendants, cited Chalmers *v.* Storil, 2 Ves. & B. 222, where upon a similar devise the widow was put to her election.

The MASTER of the ROLLS said that he could not distinguish the two cases. The substance of the will is, that there should be an equal division of the property, which cannot take place, if the widow is to have a third. The real and personal estate are united together; the personal estate is not subject to any antecedent claim; and is not the real estate intended to be given in the same manner? The principle certainly is, that the court will go as far as it can, not to exclude the claim to dower; but here it would be inconsistent with the will.

Dillon *v.* Parker.

Jacob, 505.

Parties having a right to elect between two titles, under one of which they were tenants for life, and under the other tenants in fee simple, continuing in possession for forty-three years, and executing deeds reciting that they held under the former title, their heir at law precluded from claiming the fee under the latter.

April 19, 27, 30, May 4, 1822.

THIS cause, reported 1 Swanston's Reports 359, came on to be heard on appeal from the Rolls.

Mr Dillon, the plaintiff, in person, in support of the appeal.

Mr Horne, Mr Shadwell and Mr R. Appleyard, on the other side.

In addition to the evidence at the former hearing, the purport of the agreement between sir H. J. Parker and his son was read, as stated in the answer; the agreement was, that in consideration of 200*l.* per annum for his life, sir H. J. Parker was to convey to his son all his estate and interest in the manor of Talton, and in certain other lands in the county of Worcester, and the leasehold estate at Tredington, with a proviso making the agreement void in the event of the son dying in the lifetime of his father. In the answer to the supplemental bill it was also stated, that by another proviso the articles were to become void in case of his marrying without his father's consent.

In the course of the argument the Lord Chancellor, referring to the case of Cholmondeley *v.* Clinton, 2 Jac. & Walk. 1, remarked, that the equity on which the bill rested was one that might have been insisted

upon immediately after the death of sir H. J. Parker, and suggested, that the time elapsed would be a bar to it, unless it was kept alive by something in the nature of a continual claim. On this part of the case Mr Dillon contended, that as Margaret and Ann Parker, during their lives, were in possession of the estates, and entitled to them in either character, they were not called on to elect which they would adopt; and he cited Crofton *v.* Ormsby, 2 Sch. & Lef. 603, where it is laid down by lord Redesdale, that laches is not to be imputed to a party in possession under an equitable title, from his neglecting to obtain the legal estate.

The Lord Chancellor. This bill was filed in the year 1814, with a view to the determination of what were the equitable titles which existed in the year 1771, there having been, during that interval, two ladies, whose heir at law the plaintiff is, in whom those titles were supposed to vest; one of them lived till 1785, the other till 1814, having made a will in 1811, by which she certainly proposes to devise some of these estates.

The bill prays, that sir Henry John Parker may be declared to have elected with respect to the settled estates. On his marriage in 1741, he executed a settlement, by which he reduced himself to a tenantcy for life in certain estates; those at Talton and at Salisbury court were freehold; that at Tredington, all or nearly all leasehold for lives: the limitation of the former estates was to himself for life, with remainder to his first and other sons in tail male, remainder to himself in fee. His son, John Parker, accordingly became tenant in tail. The limitation of the leasehold was such, that the son, if he survived his father, and thereby acquired the character of his heir, would have taken an estate in the nature of an estate tail, but having died first, the father became again intitled to it. Besides the son there were two daughters of the marriage, Mrs Garstin and Mrs Strode. The son attained his age of twenty-one years, in his father's lifetime: he was intitled also to an estate at Hatch, and a messuage in Shorter's court.

Some agreement was entered into between the son and the father, the latter of whom is stated to have been in distressed circumstances: I collect from the reports of the case, that the Master of the Rolls had no evidence before him as to the nature of that agreement; that deficiency is, however, now supplied. The bill charges, that there were some articles of agreement; the answer states them, and that part of the answer having been read, I am bound to take it as evidence of their contents. And here I must observe, that if the answer had left these articles of agreement in the same state of uncertainty as the bill, that circumstance would be one which a court of equity ought to look at as very material with reference to what ought to be done in judging of a claim made after a lapse of so many years, where, in the absence of information, you are driven to make conjectures which may be right or may be wrong.

However, the answer setting forth this agreement has been read; and I must remark, that I have nothing to do with the wisdom or the folly of such an agreement. I cannot now decide in 1822, that an agreement made in 1766 was foolish or improvident, or such as a father should not have called for. How could any judge take upon himself to say, even if it did now appear unreasonable, that there might not be very cogent reasons for it at the time, considering that it was a family transaction, the circumstances attending which are now unknown?

The effect of the agreement was, that sir H. J. Parker was to convey to his son his life interest and reversion in the Talton and Tredington

estates. It was stipulated, that if he survived his son they should revert to him again; and I cannot say, that a father in his lifetime conveying property to his son may not make such a stipulation. It is said, that the proviso by which the estates were to return to the father in case of the son marrying without the father's consent was unreasonable; but how is the court now to say, that the father ought not to have made such an agreement with his son? There might have been many good reasons for it at the time, which no one now survives to tell us.

Under these circumstances John Parker the son makes his will, which admits of two views, as being intended to operate only if he should survive his father, or as intended to be a disposition of his estate and effects, whether he should survive him or not. Having two sisters of the whole blood, and two of the half blood, he appears to me to have wished that the property coming from the mother's side should be kept distinct from that which came from the father's side. It is to be lamented, that the will was not more providently penned; but it must be observed, that many of the apparent difficulties found in a will made in 1769 might probably at that time have been explained, although they may not now admit of explanation.

The will was to operate as to property which might not be his at the time of his death; which would be his if he survived his father, but which would not be his if his father did not die before him. He gives all his freehold and leasehold estates that he was seised or possessed of, or was or should be entitled unto, to his father "for and during his natural life." There is a good deal of inaccuracy in this: it is difficult to believe that he meant to comprehend estates that were subject to a contingency by which, if his father survived, they were not his; for the words, "I give, &c. to my father for and during his natural life," suppose him to die before his father. He then gives his estate in Shorter's court, and a moiety of his estate at Hatch, for the benefit of his sisters of the half blood. And being in possession of the Talton and Tredington estates under the agreement, but not of the house in Salisbury court, he gives them with the other moiety of his estate at Hatch, and his other estates in Worcestershire and Warwickshire, and all other estates which descended or came, or which should descend or come, to him from his father, to his sisters, Margaret and Ann Parker, their heirs, executors, &c. as tenants in common. Now it is difficult to see how he could devise the house in Salisbury court, as it was not a subject of the agreement, and could, therefore, only come to him after his father's death. It is inaccurate also, in point of law, in devising estates that were to descend on him afterwards.

Now, if the case depended upon the true construction of this will, I think it would be very difficult to say what the testator meant; whether he meant that all the devises relating to the estates which were the subjects of that agreement should operate only in the event of his surviving his father; or whether he meant that, notwithstanding the agreement, those estates should revert back into the possession of his father, not under the effect of the agreement, but under the effect of the will. If the latter was his intention, if he meant that his father should take back these estates under his will, then there is no doubt that a case of election was raised. If, on the other hand, the estates were not to pass by the will to the father, in case of his surviving, but he was to take them in that case by reason of his surviving, as he would do under the agreement without the will, then there would be nothing that could raise a case of election.

[Dillon *v.* Parker.]

I am of opinion, that no one can confidently say which was the intention of the son. But I am content to take it for granted, that he did not intend to raise a case of election. I beg to be understood, that I say this without prejudice to the construction of this will either way, if the question should be further discussed: for the purpose of giving my opinion, I am willing to take it that this will meant to propose a case of election. On the other hand, no one can help feeling with the Master of the Rolls, that if there be so much doubt upon it, it is not wonderful that sir H. J. Parker should conceive that it did not propose a case of election; and it is not unreasonable to say, that not conceiving himself bound to elect, he never did make an election. But here again, for the purpose of giving my opinion, and without prejudice to what may be said in any other stage, I will suppose not only that it was a case of election, but that the father actually did elect.

Undoubtedly the father electing to take these estates under the will of his son might by his own will again make them the subjects of election. He certainly seems to have usurped a great deal of testamentary power: several estates he has attempted to devise which he could not do. He gives to Henry Parker and Daniel Fox the manor of Talton, and his other estates in Worcestershire and Warwickshire, the house in Salisbury court, and the Hatch estate, and all his other freehold estates, for a term of a thousand years; and subject to that term he gives a moiety to his daughter Margaret for life, with remainder to her male issue, with a remainder in that moiety to his daughter Ann and her male issue: and the other moiety to his daughter Ann for her life with remainder to her male issue, with remainder in that moiety to Margaret and her male issue, and other remainders over, under which the defendant claims. He then gives his leasehold estates upon similar trusts, to be enjoyed together with the freehold as long as the law would permit. The trusts of the term were to raise money for payment of his debts, and for paying fines upon the renewal of any of the leases. He appoints his daughters Margaret and Ann his executrixes, and gives them the residue of his personal estate. By the codicil he exempts his personal estate from his debts, in order that it may go clear to his executrixes.

This latter clause might not perhaps be very operative, from the circumstance that his personal estate was inconsiderable. But whether it was much or little, if it was claimed and enjoyed under the will, let the amount be what it might, that enjoyment under the will is *pro tanto* operative with respect to election. If the estates devised were not his, he has declared an intention to throw upon them what he could not do without the concurrence of the persons entitled to them.

If there was a case of election under the will of the father of these ladies, it is said that what was done by Ann Parker in her will in 1811 was an act showing that she claimed against the will. But if there had been an election, and acts done which proved it, a declaration made afterwards will not do: it comes too late.

Mr Dillon argues with respect to the mortgages, that in some of them the covenants are for these ladies and their heirs. It might be, that persons willing to pay the debts of their family might care but little whether they were paid out of their inheritance, or out of a term attempted to be raised on their estates; and with respect to the reservation of the equity of redemption, it may be said, that mortgagees prefer having it in such a form as not to call on them to determine any questions as to who is entitled. But when you consider that it is dealing with a term overriding the

estates of children unborn, and that the persons entitled to say that they would take independently of the will, describe themselves as having the character of devisees for life under that will, it is very difficult to reason away the effect of that, and to say that they have not submitted to it; and if they have done so, their heirs cannot quarrel with their submission. Instead of any thing like continued claim, there has been no act of the kind.

Possession alone would be equivocal; but when parties are willing to state in instruments the character and title under which they have and have had possession, you must attribute their possession to the title and character which they state. You must then consider them to have been in possession as tenants for life, and how could that be but under the effect of the will?

It has been said, that this may all have been done as what Mr Fox and Mr Maddocks thought the best mode of arranging the matter. It would be very well to make such an assertion, if you could find out with a considerable degree of accuracy what were the motives of the parties at the time. But that is almost, if not entirely, impossible, in examining into things that happened nearly half a century ago: you can then have no better criterion to look at and abide by than the documents which contain their acts.

Supposing this not to be capable of being maintained (though I confess I take it to be so), the next question is, whether this court, after forty-three years, can set up a claim which might have been set up at that distance of time?

It was said that the legal estate was outstanding; whether it was or not I do not know, nor do I apprehend that it is material. The case of Cholmondeley *v.* Clinton has settled that; for there the legal estate was not in lord Cholmondeley or in lord Clinton, but in a mortgagee: but as the mortgagee had been dealing for one of the parties just a little bit, as lord Kenyon would say, more than twenty years, the house of lords held, that that little bit drew to that party the right of calling for the outstanding legal estate. That was the case of a mortgagee; and though a mortgagee is said to be a trustee, yet there is a great difference, and nothing proves it better than this, that though he is a trustee for twenty years, yet if he takes but a little bit more, the case becomes altered. The mortgagee is not under any obligation to keep alive the equity of the mortgagor. He is a trustee for 19 years, 364 days, 11 hours, and 59 minutes; but at the end of the 365th day he is no longer a trustee, if there has been no acknowledgement and no account.

Courts of equity say that parties must come in reasonable time. The peace of mankind and the security of property require it. Then am I at liberty to say, against the effect of all the acts that have been done, at the end of forty-three years, that an equity exists which has not been insisted on from 1771? Am I to declare that the equity sought for subsists now, even if it be admitted that it did exist immediately after the death of Sir H. J. Parker? My opinion is that I cannot.

Decree affirmed.

Cox *v.* Allingham.

Jacob, 514.

The probate act-book of the prerogative court, containing an entry of a will being proved, and of probate being granted to the executors therein named, admitted as evidence of those persons being the executors, without accounting for the non-production of the probate.
May 6, 1822.

THE plaintiffs claimed under an assignment of a lease made by the executors of the lessee. To prove that the assignors were his executors, they produced from doctors' commons the probate act-book, containing an entry, that his will was proved by the executors, and probate granted to them. The probate was not produced, nor was any evidence offered to account for its non-production. An objection was taken, on the part of the defendants, to the reception of the act-book as evidence.

Mr Agar and Mr Lovat, for the plaintiffs, cited Garrett *v.* Lister(*a*), where the book of the ecclesiastical court, "wherein was entered the act or order of the court for the granting" of letters of administration, was received as evidence of the party being administrator. They also cited Shepherd *v.* Shorthose, 1 Strange, 412.

Mr Wingfield, Mr Horne, Mr Sugden and Mr Barber, on the other side.

The proper evidence of the person in question being executor is the probate, and in order to render any other proof admissible, it should first be shown, that the probate could not be procured, and then the next best evidence is, an exemplification of it, which should have been produced here. Garrett *v.* Lister was the case of proof of administration, with respect to which there is a distinction, arising from its being the practice of the ecclesiastical court not to grant exemplifications of letters of administration(*b*): hence the certificate of the court that administration has been granted, or the act-book is admissible. But even in that case the administrator, before he can have recourse to this evidence, must show that the letters of administration have been lost(*c*).

The Master of the Rolls. The thing which it is required to prove is, to whom the ecclesiastical court has granted the power of administering the property. The ordinary evidence is the probate, which is a copy of the will with a certificate under the seal of the court, that probate has been granted to the executor. It is only the act of the ecclesiastical court that is to be proved. Now we have here the original book containing the entry of the act of the court. The probate is only a copy of this act: this is the original, and, therefore, the primary evidence. But even an examined copy of the probate would be evidence of the person being executor. I observe, that it is so laid down in Mr Phillip's book, p. 317, 3d

(*a*) 1 Levinz, 25. See the other cases collected by Mr Phillips. Treatise on Evidence, p. 319, 3d edition.

(*b*) Bull. N. P. 246.

(*c*) Ibid. 108.

edition, and in Hoe *v.* Nelthorp, 3 Salk. 154, 1 Ld. Raym. 154, and in King *v.* Haynes, Skin 584, before lord Holt, and this without proving that the probate itself is lost.

In the case cited from Levinz, it is said that title was made to a term as administrator, but no letters of administration were produced: it does not say that they were lost; and the book of the ecclesiastical court was received. That case is in point. The book produced was like this, the one in which the grant is entered. It cannot possibly make any difference whether it is the case of an executor or administrator; for all that is wanted in either case is to show, that the ecclesiastical court gave authority to the person in question to administer.

De Tastet *v.* Bordenave.

Jacob, 516.

Both parties ordered to be examined upon the trial of an issue, directed upon a motion for an injunction, supported by the plaintiff's affidavit, and opposed upon the affidavit of the defendant contradicting it.

An order directing an issue, not to be appealed from after the trial has taken place. *Semble.*

May 24, June 28, July 2, 1821; Jan. 29, Feb. 8, May 11, 1822.

THE bill stated that the plaintiff and defendant were partners in the mercantile house of Bize, Bordenave, and Co.; that the plaintiff had lately given a notice of dissolution, but that the defendant was continuing to carry on the business; it prayed an account, a receiver, and an injunction to restrain the defendant from interfering with the partnership property, and from using the partnership name. Upon the filing of the bill an application was made to the Master of the Rolls for an injunction, upon a petition stating the above circumstances, and an affidavit by the plaintiff in support of it.

The defendant made an affidavit, denying the partnership, and stating himself to be solely concerned in the house, in which, however, he had been assisted by the plaintiff, who was his uncle: he represented that the plaintiff, having guaranteed his engagements, required that half of the profits of the house should be set apart in the books in his name, to indemnify him from any liability in consequence of such guarantee, but that all the profits were to belong to the defendant, who was to receive them as soon as the plaintiff's guarantee should be satisfied.

The petition being heard on the 25th of September 1819, the Master of the Rolls did not grant the injunction, but ordered an issue to try whether the plaintiff was a partner in the house of Bize, Bordenave and Co., and any special matter was to be endorsed upon the postea; and it was ordered, that each party, plaintiff and defendant, should attend at the trial of such issue, and be examined on oath, as to the matter of the said issue: further directions were reserved till after the trial of the issue, with liberty to the parties to apply.

The trial was delayed some time by the absence of the plaintiff from England. On his return in June 1820, he moved, before the Vice-Chancellor, for the production of papers with a view to the trial; and an order

was made accordingly, upon his undertaking to set down the issue, at the then sittings of the court of king's bench. The trial came on at Guildhall in October in the same year: both parties were examined, and a verdict found in favour of the defendant. The plaintiff now petitioned for a rehearing of the order of the 25th of September 1819, so far as it directed the examination of the parties at the trial; he also gave notice of an application for a new trial. The petition of rehearing came on first. It was alleged that the minutes of the order of September 1819, were drawn up by the plaintiff's solicitor.

Mr Agar, Mr Littledale and Mr Pepys, for the plaintiff, contended, that the order for examining both parties at the trial was unprecedented, and that such orders could not be made, except by consent, or in bankruptcy, where the course of proceeding is altogether different, the affidavits of the parties interested being admitted. In general, when a party is ordered to be examined at the trial of an issue, it is either where he is a formal party without interest, or if he be interested, where the opposite party is desirous of interrogating him before a jury, for the purpose of eliciting from him admissions against himself, hoping to prove his story fabricated, by subjecting him to the scrutiny of a rigid cross-examination. This is quite analogous to the usual course in equity: it is only substituting a *viva voce* for a written examination. But the present order is quite different: according to the construction put upon it, the effect has been, that each party was called to prove his own case; and as there was not much other evidence, the verdict depended on the comparative credibility of the plaintiff and defendant. A court of equity cannot, however, act upon evidence of this description: the statements of the parties could be of no effect at the hearing, except as against themselves; then upon what principle can such proofs be let in through the medium of a jury? If a decree were to be made according to the verdict, it would be the result of evidence which the court itself could not have listened to. If it was not the object that the parties should be examined on their own behalf, the order has been misunderstood at law.

Mr Horne, Mr Puller, Mr Treslove and Mr Campbell, for the defendant.

In several instances, orders for the examination of both parties have been made, where the facts disputed rest in their knowledge only: the court, in ordering issues, exercises a power of having the trial conducted in the manner most satisfactory to it. The practice is stated thus by the Vice-Chancellor, in Ex parte Lister, Buck. 234; Harwood *v.* Harwood, Cit. 4 Madd. 236, and Gardiner *v.* Rowe, 4 Madd. 236, are instances of the kind. Howard *v.* Braithwaite, 1 V. & B. 374; Rogerson *v.* Whittington, 1 Swanst. 39. A similar order was made in a case of Peacock *v.* Peacock in 1814. Besides this, the order in question was obtained by the plaintiff, who at the time made no objection, who afterwards made a motion founded upon it, and went to trial, acquiescing until an unfavourable verdict was given: he is not now at liberty to attempt to get rid of an order, of which he would have taken the benefit, if the result had been different.

The Master of the Rolls. The application for the injunction was made in the ordinary course; but there were contradictory affidavits as to the material facts, which made it probable that the case would ulti-

mately be the subject of an issue. I do not recollect which party proposed it, but I believe it was convenient to both to have it tried as soon as possible. The order is not expressed to be made by consent, and therefore cannot be treated as such; but I think it would have been more correct if the party who drew it up had stated it as being by consent; for the court would certainly not have imposed these terms itself. I am sure that I should not have made the order, if I had not seen that the measure was approved by both: and if the plaintiff then thought it proper, he does not now come with a very good grace to complain of an order thus drawn up and acted upon.

The order was made in September 1819. The complaint is not made till a year after, and after the trial has taken place. Then is it not too late for this application, at least at the instance of the party drawing up the order, and thus acting on it? If it was inaccurate, there was ample time before the trial to set it right; instead of which an application was made for the purpose of prosecuting it. Even at the trial no objection was made, as I understand, to the examination of the parties in this manner. Surely all this is enough to preclude the party who obtained the order from now complaining of it.

Therefore, even if the order were incorrect, it would be a material question, whether it is not too late to rectify it; but I am of opinion that it is one which, according to the practice of the court, may be made where the circumstances require it. An issue, being intended to inform the conscience of the court, may be tried in any manner and with any qualifications which the court thinks fit. As to this point, the cases cited are sufficient; and I am persuaded that many other cases have occurred where the same has been done. Under these circumstances, the petition of rehearing must be dismissed, and I think it is a case in which it must be dismissed with full costs.

The application for a new trial was then made: it was discussed at considerable length with reference to the evidence and the facts of the case, and was refused.

Jan. 29.—The plaintiff appealed to the Lord Chancellor; and the motion for a new trial, and the appeal from the order, directing the issue, were now brought on together.

Mr Scarlett, Mr Agar, Mr Littledale and Mr Pepys, for the plaintiff.
Mr Horne, Mr Puller and Mr Treslove, for the defendant.

The Lord Chancellor, upon the opening of the case, with reference to the direction in the order for the examination of the parties, said that it was a very common thing in bankruptcy and in causes also. This order is imperative, making it necessary that both should be examined; if it only gave liberty to examine them it would be different: in that case there would be no default in not calling them. But this order is as plain as possible: both are to attend and be examined. This matter is often mistaken at common law. Where the parties are to be examined, it is not meant that they should be witnesses for themselves or for the other side, but they are witnesses for this court.

It is difficult, certainly, to know on what principle the court proceeds in these cases. If there be only the evidence of one witness against the

answer, the court will not make a decree upon it; and yet if the cause is sent to an issue, and it appears upon the postea that only one witness was examined, the court will make a decree founded upon it.

I apprehend this matter came before the Master of the Rolls, upon the bill and affidavit on the one side, and affidavit on the other. The injunction was asked for upon the affidavit of one party, and opposed upon that of the other: it was not at the hearing, but on motion: an issue was directed; then was it not fit that both of them should be examined?

Besides, on another ground, I would not disturb this order. If the petition of rehearing was lodged before the trial, an application should have been made by motion to stay it. If the application for the rehearing was not made till after the trial, it was too late. But I am clearly of opinion that the order is right.

May 14.—The Lord Chancellor stated the substance of the bill and the affidavits. The application for the injunction could only be supported by such evidence as the plaintiff by his own affidavit could furnish, and that was answered on the part of the defendant. The affidavits were read, not with a view to determine whether the court should decree a partnership account, but to determine whether it should in the first instance lay its hands on the property in favour of a person stating himself to be entitled to an interest in it.

When the motion came on, it was impossible to grant the injunction; for the plaintiff resting on an affidavit, if that is directly contradicted by another affidavit, the court does not know how to deal between the two. The plaintiff represented that the person carrying on this concern as his own, was really carrying on a partnership concern: the defendant denied the partnership, stating himself to be solely interested. In such a state of things the court could only be neuter, and granting an issue was more favourable to the plaintiff. The Master of the Rolls must have considered that if there should be a verdict for the plaintiff, the affidavit of the defendant would be displaced by it, and that he would then be able to act upon the affidavit of the plaintiff, which he could not do while it was contrasted with the other. He was also of opinion, and I think he was quite right, that upon this application, with these affidavits, it was very fit that the jury should try the credit of these parties; and it should be understood that when they are ordered to be examined, they are not to be considered as the witnesses of either side, but of this court, which orders them to be examined. It is not of any great importance whether they were examined first or last; it is enough that they were examined, and that, therefore, that which the court directed has been done.

His lordship then, after going through the evidence, refused the motion for a new trial.

Orrok *v.* Binney.

Jacob, 523.

On a bill by an executor to recover a fund belonging to the testator, it appearing that the testators' debts were paid, and that the fund was bequeathed to infants, the court refused to have it transferred to the executor, but secured it in court for the benefit of the infants.

Rolls.—May 7, 9, 13, 1822.

THE bill in this cause was filed to obtain a transfer of a sum of 3657*l.* 14*s.* 7*d.* four per cents, standing in the name of the defendants as trustees for W. Brook, deceased. W. Brook had died in 1810, having bequeathed this sum to the plaintiff's children, who were infants, and appointed the plaintiff his executor. It was understood that his debts had been paid.

Mr Wingfield and Mr Norton, for the defendants, submitted to transfer the fund; suggesting, that as the court was informed of its belonging to infants, it should be secured for their benefit, instead of being paid over to the plaintiff.

Mr Wakefield, for the plaintiff, contended, that in a suit by an executor, to get in the assets of his testator, the court was in the habit of handing them to him, as the person legally entitled, and leaving him to administer them in the ordinary way, without inquiring whether the debts were or were not paid. The legatees were not precluded by this course from any remedies they might see reason to take.

The Master of the Rolls. The bill here is filed twelve years after the testator's death. There is no suggestion that this fund is wanted for the purpose of paying debts. It has hitherto stood in the names of trustees, and the plaintiff now desires that it should be transferred to him; but is it not safer to have it secured in court till the children attain twenty-one? If the executor were not so respectable as he is in this case, or if he were engaged in trade, could the court hazard the property by handing it over to him? Being apprized that the fund is one belonging exclusively to infants, I must direct it to be brought into court, not from any suspicion of the party, but upon general principles. There is sufficient ground for considering this to be a clear fund belonging to the infants, and the court is bound to protect it. The infants should be added as parties to the suit, and the money brought into court.

The bill was amended by adding the infants as co-plaintiffs; and a decree was afterwards made, directing the fund to be paid into court, and the dividends to be paid to the father for the maintenance of the infants.

Reg. Lib. B. 1821, fol. 1762.

Carvick *v.* Young.

Jacob, 524.

Irregularity of subpœna to hear judgment waived by appearing on a motion to advance the cause, and not then taking the objection.
May 20, 1822.

MR WINGFIELD, for the defendant, moved to discharge the decree in this cause, upon the ground that the subpœna to hear judgment was incorrect, the plaintiff's name being spelt Carrick in it. The defendant did not appear at the hearing, and the decree was made by default. Previously to the hearing, but after the cause was set down, a motion had been made to advance it, upon which the defendant appeared by counsel and opposed it, but the objection to the subpœna was not noted upon that occasion.

The LORD CHANCELLOR. It strikes me that if the cause was set down, and a subpœna served with the name of Carrick instead of Carvick, and the defendant afterward appeared on a motion to accelerate the hearing, without objecting on the ground of that error, he could not afterwards take that objection. The cause could not be advanced if it was not regularly set down. Why did not you then state that you had not been regularly served?

Motion refused.

Tyndale *v.* Warre.

Jacob, 525.

A person present at the sale allowed to open biddings, but a larger advance expected from him.
June 4, 1822.

A MOTION was made to open biddings, on behalf of a person who had attended by his agent at the sale. An advance of 600*l.* upon 3800*l.* was offered. The motion had been made before the Vice-Chancellor, and was refused by him.

The Attorney-General and Mr Simpkinson, in support of the motion, contended that the rule laid down in the case of M'Cullock *v.* Cotbach, 3 Madd. 314, that a person present at the sale should not be allowed to open biddings, was opposed to numerous authorities. Rigby *v.* Macknamara, 6 Ves. 117; Barker *v.* Preston, 16 Ves. 140; and Thornhill *v.* Thornhill, 2 Jac. & Walk. 347.

Mr Treslove on the other side, urged the injurious consequences of allowing biddings to be opened in all cases. The practice must have ori-

ginated in an idea of there being some equitable grounds for a resale, most probably upon the supposition of there having been surprise or some other circumstance preventing the party from bidding. That is out of the question, where he has attended the sale, purposely reserving his offer till he knows the result.

The Lord Chancellor. For many years that I have been here, I have heard the practice of opening biddings lamented, and I cannot, therefore, account for its having continued the rule of the court, except upon a notion which I believe to be well founded, that there is in general more real wisdom in adhering to the old practice than in adopting new rules. If it is to be laid down as the rule, that a person present at the sale is not to open the biddings, it must be a rule made under very different circumstances from those in which it is now supposed to prevail. I should not think it right to alter the practice without consulting the Master of the Rolls and the Vice-Chancellor; and if it be right to make any general rule, it ought to have publicity given to it before it is acted upon.

The court certainly looks with jealousy upon the circumstance of the person applying having attended the sale, and the way in which that jealousy has been exercised has been by expecting a larger offer to be made, under the idea of having a compensation by the largeness of the offer for any loss that may have arisen from the want of competition at the sale. There can be no general rule upon the subject, but I think this offer of 600*l.* ought to be accepted. I state this without prejudice to what may be done hereafter by any general order made with the assistance of the Master of the Rolls and the Vice-Chancellor; and I think that considerable publicity ought to be given to any such order, that persons bidding in the office may know what the rule is.

Taylor *v.* Oldham.

Jacob, 527.

After a decree in one of two suits commenced in the name of an infant, it is not usual to refer it to the Master to inquire which suit is most beneficial.

But under the circumstances, the next friend in the suit in which a decree had been made was removed, and the next friend in the other suit substituted for him.

June 13, 15, 1822.

THE infant plaintiff was entitled to some real estate, and to the residue of the personal estate of her father: her mother was her guardian, and also executrix to the father. A bill was filed in the name of the infant by S. Taylor, her paternal grandmother, as her next friend, against the infant's mother and her husband, for an account. The defendants appeared, and took an order for time to answer. In the mean time a second bill was filed for the same purpose against the same defendants, in which the infant was plaintiff, by T. Rodber, her maternal grandfather, as her next friend: in this suit the same solicitor acted for the plaintiff and defendants, an answer was put in, and, about three weeks after the bill was filed, the cause was heard by consent at the Rolls, when a decree was made for

taking the accounts, and for the appointment of a receiver. Under this decree the son of the next friend was proposed and appointed to be receiver. The next friend in the first suit afterwards obtained an order for the Master to inquire which of the two suits was most for the benefit of the infant plaintiff. The Master reported, that it would be most for the benefit of the infant, that the first suit should be prosecuted; being of opinion, that the second was a contrivance to elude the effect of the first, and to place the conduct of the proceedings in the hands of the defendants' friends. Upon this report an order was made by the Vice-Chancellor, on the 20th of April 1822, on the motion of the next friend in the first suit, directing that all proceedings in the second suit should be stayed, that a receiver should be appointed in the first, and that the next friend in the second suit should pay the costs of the reference and the motion. A motion was now made on the part of the next friend in the second suit to discharge this order.

Mr Hart and Mr Pepys, in support of the motion, contended, that after a decree it was irregular to refer it to the Master to inquire whether the suit was for the benefit of the infant, and that the proceedings under the decree ought not to be suspended on the ground of the pendency of another suit, which had not come to an hearing. They also submitted, that the decree having been pronounced by the Master of the Rolls, the Vice-Chancellor had no jurisdiction to make an order, preventing it from being carried into effect.

Mr Heald and Mr Teed, on the other side.

The Lord Chancellor. With respect to the question of jurisdiction, I must look into the act. I remember that it does not give power to the Vice-Chancellor to alter any order made by the Master of the Rolls, and does not give the Lord Chancellor power to authorize him to do so. There is considerable difficulty of another kind: for though I admit that where there are two suits, in one of which a decree has been made, the other not having arrived at a decree, it is not usual to make this reference to the Master, yet I will not say that there may not be exceptions, and an exception may perhaps be furnished by an amicable suit of this sort. But there is this difficulty, that there may perhaps never be a decree in the first cause. The receiver, who has been appointed, is, I believe, a very respectable person: but the son of the next friend is not the person whom he is most likely to check and control.

June 15.—The Lord Chancellor said he thought it was not right that the son of the next friend should be the receiver. He thought that, instead of staying the proceedings in the second suit, it would be more according to the practice of the court, to convert it into an adverse suit, by giving the conduct of it to the other parties, rather than to trust to the chance of the first suit coming to an hearing.

The order of the 22d of April 1822 was discharged. T. Rodber was discharged from being the next friend of the infant plaintiff in the second suit; and it was ordered that S. Taylor (the next friend in the first suit) should be the next friend in the second suit, in the room of T. Rodber. It was also ordered that the receiver should be discharged, and another appointed. The costs on the part of the plaintiff in both suits were to be

taxed and paid by the receiver out of the estate, without prejudice to any application by the infant plaintiff for reimbursing her estate those costs.

Reg. Lib. B. 1821, fol. 1718.

Amory *v.* Brodrick.

Jacob, 530.

On a reference to the Master to inquire whether proceedings at law and in equity are for the same matter, all proceedings are in general stayed in the mean time.

But where the plaintiff having, before the order was drawn up, proceeded at law, the defendant had applied to the court of law and obtained time upon terms, it was held, that he had waived the benefit of the order, and was bound by the intermediate proceedings.

June 13, 15, 1822.

THE bill in this cause was filed in October 1821; the defendant Brodrick having put in his answer, obtained an order on the 24th of April 1822, for the plaintiff to elect to proceed in this suit, or in an action, which he had commenced in the court of king's bench. On the 10th of May the plaintiff moved before the Vice-Chancellor, to discharge this order, when the usual order was made for a reference to the Master, to inquire whether the plaintiff's proceedings at law and in equity were for the same matter. It did not appear that any thing passed upon the discussion of this motion, with reference to the question, whether the plaintiff was to be permitted to proceed in the mean time.

The order of the 10th of May was not drawn up for some time, in consequence, as the plaintiff stated, of the pressure of business at the register's office. The plaintiff having obtained interlocutory judgment at law, on the 18th of May, gave notice of his intention to execute a writ of inquiry on the 3d of June. The defendant, on the 25th of May, issued a summons to show cause why the execution of the writ should not be stayed on account of the absence of a material witness; and on the 30th of May, after an hearing before Mr Justice Bayley, the execution of the writ was stayed for six weeks, upon the defendant undertaking to give final judgment as of Trinity term, and not to bring a writ of error, or file any bill in equity for delay.

The defendant, on the 4th of June, moved, before the Vice-Chancellor, that the plaintiff might be restrained from taking any further step at law till the reference of the 10th of May should be disposed of; and also from taking advantage, or making use of the proceedings which had taken place at law since the 10th of May. His honour granted the motion so far as it sought to stay further proceedings pending the reference. The other part of the motion, viz. to restrain the plaintiff from taking advantage of the intermediate proceedings at law, was now renewed before the Lord Chancellor.

Mr Heald and Mr Knight, in support of the motion.

The order of the 10th of May, for a reference to the Master, to inquire whether the proceedings at law and in equity are for the same purpose

ought, when drawn up, to contain an injunction to restrain the plaintiff from proceeding in the mean time. Mills *v.* Fry, 3 Ves. & B. 9; Carvick *v.* Young, 2 Swanst. 239; Hogue *v.* Curtis, 1 Jac. & Walk. 449. The Vice-Chancellor was of opinion, that the restraint on intermediate proceedings was not necessarily to form a part of the order, unless specially applied for at the time: but we contend that it is of course to insert it, and that it ought, therefore, to be considered as operating from the 10th of May. And as no step should have been taken at law since that time, the plaintiff should not be allowed to avail himself of what has been done there.

Mr Hart, on the other side.

The Lord Chancellor. The course of proceeding I take to have been this. The order to put the plaintiff to his election was made as of course. The plaintiff applied to discharge it: the effect of which was, that an order was made, referring it to the Master to inquire whether the proceedings at law and in equity were for the same matter. If upon that occasion the attention of the court had been called to the particular nature of these proceedings, it might have said that the case was so clear that the plaintiff should be put to his election without going to the Master: or it might have said that there should be a reference, and then the court ought to direct what should be done in the mean time. The question here has been, whether the order for a reference, without more, restrains the proceedings, or whether in drawing up the order, the injunction ought to be inserted as of course, or whether it ought to be asked for.

It is not clear to me what the court would have done, if, at the time when the motion was made, the circumstances had been stated. But, putting it in any way, I do not know how I can relieve the defendant beyond what the Vice-Chancellor has done. For if the order, when drawn up, would operate as an injunction, still it is competent to the party to waive the benefit of it, and the question is, whether that has not been done. As soon as any step was taken at law, an application might have been made to the court. Then, supposing either that the order would operate as an injunction, or that it would in terms include an injunction, still if the defendant allows the other party to go on at law, and takes steps himself, not asking for the benefit of the prohibition, either expressly or impliedly contained in the order, can he afterwards object? I may mistake the nature of the case; but it does appear to me that he has waived the benefit of the order, whatever may be the terms in which it was, or ought to have been made.

With respect to the order, my opinion is, that an injunction to stay proceedings during the reference, ought to be inserted as a matter of course, and if the party can state that justice will be better done by permitting proceedings to this or that extent, it is for him to ask for leave so to proceed, and to state his reasons. The only difference of opinion here is, whether it lies with the defendant to ask for the injunction, or whether the registrar is to insert it of course. I am of opinion that it should be inserted of course, and that the order of reference implies an order to stay all proceedings, whether it be asked for or not.

Back *v.* Kett.

Jacob, 534.

A testator having directed his executors to sell whatever real estates he might die possessed of, and having given benefits to his heir at law, afterwards acquires other lands. The heir is not bound to elect.

Rolls.—June 20, 1822.

THOMAS BACK, by his will, dated in December 1813, desired his executors to sell whatever real estates he might die possessed of; the produce he directed to be invested upon certain trusts for the benefit of his children. The testator, after the date of his will, purchased other real estates of considerable value, and he acquired some other estates by devise or descent. He died in February 1820. The bill was filed by the younger children for the execution of the trusts of the will, and the question made at the hearing was, whether the eldest son and heir was bound to elect between the benefits given him by the will, and the real estates subsequently acquired, which had descended upon him.

Mr Shadwell and Mr Preston, for the plaintiffs, relied upon Thellusson *v.* Woodford, 13 Ves. 209, 1 Low. P. C. 249, and contended that the testator's intention to include lands subsequently acquired, was as clearly expressed here as in the case referred to, and that the heir was, therefore, on the same principles, bound to elect.

Mr Horne and Mr Sidebottom, on the other side.

The MASTER of the ROLLS. I have no doubt here. I think the case referred to has gone quite far enough. But there it was impossible to construe the will without admitting that it applied to the matter in question. The words were unequivocal. I confess, however, that without such high authority, I should have entertained doubts in that case. But if it were to be carried further, the consequence would be, that wherever expressions like these (which are very common) are used, the heir must elect. The principle is, that the will is not to be construed as operating on any property but what he had at the time. Here there was a space of seven years, in the course of which he bought other estates. He may have bought them, not for the purpose of being sold again directly on his death, but, in order that they might descend to his heir: and the heir is not to be disinherited except by express words. Now the direction is for his executors to sell all that he should die possessed of; that may mean all which the will could operate upon, that is, all which he then had, and which he should continue to have at his death. I cannot therefore think that I should be warranted in extending it to after-purchased lands, and putting the heir to his election.

Chapple *v.* Cadell.

Jacob, 537.

Partnership amongst a number of persons, to be managed by a committee of five, and by general meetings, at which the vote of the majority was to be binding; with a provision, that any one wishing to retire should first offer his share to the committee at a certain price, and if they declined to buy, might sell it to any other person:

Held, that the majority were not able to sell the whole concern without the consent of all; but that where all but two were desirous of retiring, they might sell their own shares without making an offer of them to the committee.

December 18, 1821; February 2, June 13, 26, 1822.

IN the month of July 1804, several persons, thirty-one in number, engaged as partners in the publication of the British Press and Globe newspapers. By the resolutions entered into on the formation of the partnership, it was agreed that the concerns of the papers should be managed by a committee of five of the proprietors, and that any three of the committee should have power to act: they were to be chosen quarterly, and the property was to be valued every three months. It was agreed, that in the event of any proprietor dying, or being desirous of disposing of his share in the concern, such proprietor's share must, in either case, be first offered to the committee for the time being, to be by them purchased for the general body of the remaining proprietors, at a price proportionable to the last preceding valuation; and in case the committee should decline to purchase such share, the same might be disposed of in any way the proprietor desirous to retire, or the legal representative of the deceased proprietor, might think fit. If the proprietor desirous of retiring, or the representative of a deceased proprietor, should not be able to sell his share to the committee, or to any other person, such share might be relinquished, and such proprietor, or his representative, exonerated from all debts incurred subsequent to the expiration of the then current quarter, on giving fourteen days' notice to the committee. The committee were to have power to call general meetings; and the resolutions of the majority present at all general meetings were to be binding on all the proprietors; and the questions put, were to be determined by a show of hands.

The partnership continued till December 1807, at which time the number of proprietors was thirty-one. Having been for some time a losing concern, it was proposed by some of the proprietors, that the whole should be sold, and a general meeting was convened to consider of the expediency of a sale. The meeting was attended by about twenty-six proprietors, and after some discussion, it was resolved by all, except three, that the committee should be empowered to sell, at not less than 4000*l.* for the copy-right, and if that sum could not be obtained, that the sale should be by auction. The plaintiffs were two of those who dissented. The sale took place by written tenders, and G. Lane (one of the defendants), having offered the largest sum (4600*l.*), became the purchaser. All the proprietors, except the plaintiffs, acceded to the sale, and received their shares of the purchase money. Fisher, one of the plaintiffs, attended on the day when the sale took place, and delivered to the committee a notice, requir-

ing them not to sell his share; and a few days after, the plaintiffs' attorney sent to the committee a notice, not to assign, sell, or dispose of their shares or interests in the copy-right, &c.; and stating that they understood a very unfair sale had been made, and that if the committee persisted in carrying it into effect, the plaintiffs would hold them responsible for their shares.

It appeared that Walsh, one of the defendants, and also a proprietor, had previously agreed with Lane to be jointly interested with him in the purchase. After the sale, the other defendants, Cadell, Davies and Mawman, agreed to join with Walsh and Lane in the concern, which they thenceforward carried on together. The bill alleged the sale to have been fraudulently contrived by the defendants, for the purpose of making themselves the sole proprietors of the papers; and it prayed that they might be declared to have purchased the shares of those proprietors who had parted with their right and interest in the concern, in trust for the plaintiffs and such of the defendants as were previously proprietors, and an account of the subsequent profits on that footing.

The answer admitted that the defendants and two others had agree to become the purchasers of the concern together, if an offer of 3600*l.* would be sufficient; and the defendant Lane was authorized to bid, on their joint account, to that extent; if he went beyond that, the other defendants were not to be bound, except Walsh: they said they were not aware of the price he offered; but they afterwards were prevailed upon to join with him and Walsh. Davies, Mawman and Walsh were members of the committee which conducted the sale. The defendants stated that it was the understanding amongst the proprietors that any of them were to be at liberty to bid, and it was proved that the plaintiff Fisher had applied to several persons to join him in purchasing, and he and some others employed a person to bid for them at the sale, but the sum offered by them was less than that offered by Lane.

The cause was heard at the Rolls in December 1817, and a decree was made for an account of all the dealings and transactions relating to the two newspapers from December 1807; and it was declared that the plaintiffs were entitled to such proportion of the partnership profits, and liable to such proportion of the partnership loss from December 1807 as corresponded to the shares they held at the time of the sale of the copy-right, and that they were entitled to one thirty-first share each: no costs were given.

From this decree both the plaintiffs and the defendants appealed.

Mr Hart and Mr Girdlestone, for the plaintiffs.
Mr Wetherall and Mr Raithby, for the defendants.

June 13.—The Lord Chancellor. This is an appeal from the decree of the late Master of the Rolls. The plaintiffs and the defendants, with the exception of Lane, were partners together in the undertaking mentioned in the bill. The relief sought is to exclude Lane from any interest in the concern, upon the principle that the purchase took place under such circumstances that it ought to be considered to have been made for the benefit of the other parties, and that the plaintiffs and the defendants, exclusive of Lane, ought to be declared to be beneficially entitled to the concern, in equal shares. The Master of the Rolls thought that the plaintiffs were not entitled to that share, but that they ought to be considered as being interested to the extent of one thirty-first part each.

[Chapple v. Cadell.]

The case has not been argued with very strict attention to the prayer of the bill, which is founded on the notion that Lane has nothing to do with the purchase in point of interest; but that those persons who were formerly partners, and who did not part with their interest, are to be considered the sole proprietors. On the other hand, the defendants by their appeal contend that the plaintiffs are entitled to no share at all, but that the business ought to be considered as having been sold in such a manner as to exclude all that had interests prior to the sale, excepting those who take interests under the new arrangements, and that the bill ought therefore to have been dismissed.

The question arises upon a concern of a very peculiar nature, one as to which we may almost say that it contained in itself the seeds of its own destruction. Thirty-one persons were partners in these two newspapers under certain resolutions forming the agreement between them. If either were desirous of retiring, his share was first to be offered to the committee for the time being; and it is to be observed that this article supposes that there will always be five to whom this offer can be made. But if there should be so many willing to sell as not to leave a committee of five remaining, to whom are they to make the offer?

One question which has been made is, whether the majority had a right to put an end to the concern; that is, whether they contemplated a partnership to continue for ever, consisting of the partners who should not retire, or if the committee should not choose to purchase the shares of those who should retire, then consisting of the old partners and of the new ones coming in by purchase. But it appears to me, that upon other principles it was not put an end to fraudulently. For whether the majority had or had not a right to put an end to it, it is impossible for me to say that if all but two chose to give it up, those two could insist upon continuing it alone, and being the only persons interested. All except two having agreed to determine the partnership, these regulations could not be acted on.

The case would be different, if it could be made out that the partnership was fraudulently put an end to; but I cannot find in the evidence any authority for saying so, and I can only proceed on proof, not upon suspicion. There were a variety of transactions, and whether they were or were not conducted in a manner quite consistent with the resolutions, all the parties interested, except Fisher and Chapple (and I do not say that they were very well used), agree to the sale and receive their proportion of the consideration. The bill is then filed on the supposition that the sale was in substance nothing, and that the plaintiffs and the defendants, except Lane, are now the only persons interested; a proposition which cannot be made out unless the sale ought to be set aside. That might be if it were a case of fraud; but the evidence does not go to that. And if that could be a ground of relief, I think that the plaintiffs have been mistaken, for they appear by their notice to have meant only that their shares should not be sold. It is contended fairly that the word share included not only their thirty-first parts, but also the interests which they would acquire by the others going out in the manner prescribed by the regulations. But then they must have been able to show that their conduct was such as to give them a right to that, and I cannot look at it as a case in which they were contending that the word share was to include the interest which a strict compliance with the articles would give them. It appears that if Fisher could have found other persons to join with him, he would himself have purchased. They should have said all along, that if the others thought

proper to sell, the consequence would be that they the plaintiffs would insist on being the sole proprietors, but that was not the way in which they proceeded. I should be desirous of giving relief, if I could, but upon the best consideration I can give to the case, I cannot do what is prayed by the bill: and the plaintiffs' appeal must, therefore, be dismissed.

June 26.—The Lord Chancellor. The decree of the Master of the Rolls gave to the plaintiffs one thirty-first share of each. There is another appeal on the part of the defendants, saying that the decree is wrong in giving them that share.

When the plan of the partnership was formed, the resolutions provided special means by which any one who was desirous might withdraw. It happened that twenty-nine out of thirty-one consented to part with their whole interest in the concern. It is contended by the plaintiffs, that they could not do so consistently with the articles. If there had been more consistency in the articles, there might have been more difficulty; but they seemed to have been framed upon a fallacy in supposing that their provisions could always be complied with, and I am of opinion that if so many of them chose to part with their shares, there was nothing to prevent them. The other question is, whether they could make a sale of the whole. It struck me at first that the decree of the Master of the Rolls either did too much or too little; but I do not think that there is any case of partnership that applies exactly to this, and the best judgment I can form is, that the majority might sell their own shares, but could not sell the shares of the others; and that the plaintiffs are, therefore, still entitled to theirs.

Decree affirmed.
Reg. Lib. A. 1821, fol. 2512.

Dues *v.* Smith.

Jacob, 544.

Money belonging to the wife paid to the husband, the parties being subjects of Denmark, and the law of that country not requiring a settlement.

Rolls.—June 27, 1822.

THIS was a petition by a husband and wife for payment of a sum of money out of court to the husband in right of the wife. The parties were subjects of Denmark, and an affidavit was produced, stating that, by the Danish law, the husband was entitled to receive the property of the wife without making a settlement upon her.

Mr Roupell, in support of the motion.

The Master of the Rolls made the order (*a*).
Reg. Lib. B. 1821, fol. 47.

(*a*) See Sawyer *v.* Shute, 1 Anstr. 63; Campbell *v.* French, 3 Ves. 521.

Elliot *v.* Sinclair.

Jacob, 545.

Writ of *ne exeat regno* granted upon motion made without notice, after the appearance of the defendant.

Rolls.—June 28, 1822.

A WRIT of *ne exeat regno* having been obtained ex parte on the filing of the bill against the defendant, he appeared, and moved to discharge it before the Vice-Chancellor on the last day of the term. On argument it appeared that the affidavit upon which the writ was granted had been sworn before the bill was filed, and upon that ground his honour discharged the writ. The affidavit was immediately resworn, and the writ was again moved for this day, being the day after the term. The motion was made ex parte.

Mr Treslove objected that, as the defendant had appeared, no motion could be made without notice.

Mr Wakefield, in support of the motion, referred to Collinson *v.* ——, 18 Ves. 356, and Stewart *v.* Stewart, 1 Ball & Bea. 73, where the writ was granted after decree, and it did not appear from the reports that notice had been given. In Goodman *v.* Sayers, 5 Mad. 471, the Vice-Chancellor declined to follow the latter case, but not upon the ground of the motion being made ex parte.

The MASTER of the ROLLS said he should rather suppose from what was said by the Lord Chancellor in Collinson *v.* ——, that no notice was given, but he desired the case to be searched for in the register's book, remarking that notice might frustrate the object of the motion, by giving the party an opportunity of removing himself out of the jurisdiction.

The motion was mentioned again, and the entry of Collinson *v.* ——(*a*), produced from the register's book, from which it appeared that the motion had been made without notice. Another case of Moore *v.* Hudson, 17th July 1821(*b*), was also produced, where the defendant having been ordered to transfer a sum of stock, was about to go abroad; the Vice-Chancellor upon motion made ex parte, granted a writ of *ne exeat regno*.

The MASTER of the ROLLS, upon these authorities, granted the writ(*c*).

Reg. Lib. A. 1821, fol. 1598.

(*a*) Collinson *v.* Wattleworth, Reg. Lib. A. 1811, fol. 47.

(*b*) Reg. Lib. B. 1820, fol. 1295. This case is reported in 6 Madd. 218. It appears by the register's book, that the order for the writ was upon an ex parte motion by Mr Bell.

(*c*) See Harrison *v.* Cockerell, 3 Mer. 1.

Beauchamp *v.* The Marquis of Huntley. Clarke *v.* The Earl of Ormonde.

Jacob, 546.

After a decree for the administration of a testator's estate in England and Ireland, an incumbrancer upon the Irish estate having come in and proved his debt, restrained from proceeding in a creditor's suit, instituted by him in the court of chancery in Ireland, receiving the costs up to the time of his having notice of the decree, and paying the costs of the application.
July 3, 9, 1822.

THE decree made in these causes, dated the 17th of May 1821 (vide ante, p. 53), directed the execution of the trusts of the will of the late marquis of Ormonde, the usual accounts of his real and personal estates, and the appointment of a receiver of his real estates both in England and Ireland.

A motion was now made on the part of the plaintiffs in Clarke *v.* Ormonde to restrain C. P. Blicke, an annuity creditor of the late marquis, from further proceeding in a suit instituted by him on behalf of himself and the other creditors of the testator, in the court of chancery in Ireland.

It appeared that Blicke was entitled to certain annuities granted by the testator, and charged upon part of his Irish estates, which were demised for a term of years for better securing the annuities. The bill in Ireland was filed about the same time as those in the present suits, but the subpœnas were not served until April 1822. In the mean time Blicke had, in November 1821, carried in a charge under the decree in these suits, claiming as a creditor the arrears due upon the annuities; his claim was allowed by the Master. He was resident in England.

Mr Heald and Mr Koe, in support of the motion.

Mr Wetherall, on the other side, admitted that the order might be made on the same principle as in Harrison *v.* Gurney, 2 Jac. & Walk. 563, if the suit in which the decree was made would give the party sought to be restrained the same relief as that which he would be entitled to in his own suit, but observed that here the creditor in question had a specific claim upon the Irish estates, which distinguished his case from that of the general creditors. Proving his debt under the decree was only a necessary act of prudence to preserve his right to resort to the personalty and to the English estates.

The Lord Chancellor. The bill in Ireland is stated to be one not merely seeking for payment of these annuities specifically, but on behalf of the plaintiff and all the other creditors generally. It prays an account of the personal estate: can you have that account taken here and there also? You must consider whether you can carry on the suit, and at the same time claim under this decree. If you look at the decree, I believe you will find that it is consistent with your having that interest in the Irish estates which you are entitled to specifically.

July 8.—The motion was mentioned again, Mr Wetherall submitting

that Blicke, as a creditor by a specific charge, was entitled to file a bill, and have a receiver in his own suit; at all events, he was entitled to the costs.

The Lord Chancellor. I do not apprehend that an annuitant or mortgagee has a right to a receiver of his own, unless there be a stipulation for that purpose in his deed; where there is nothing of that sort, the court in a suit for the general administration of the estate, takes the whole upon itself. You must have the costs incurred in the suit in Ireland up to the time when you had notice of the decree here: but you must, I think, pay the costs of this motion; for after you were aware of the decree, and had voluntarily come in and proved under it, you ought not to have put the plaintiffs to the expense of making the application.

His lordship doth order that the said C. T. Blicke be restrained from proceeding further in the suit instituted by him on behalf of himself and the other creditors of the said testator Walter, marquis of Ormonde and Ossory, against the plaintiffs and defendants in the second-mentioned suit, or any of them, in his majesty's court of chancery in Ireland. And it is ordered that the said C. T. B. be paid his costs of the said suit in Ireland up to the time when he had notice of the decree in the second-mentioned suit, out of the said testator's estates. And it is ordered that the said C. T. B. do pay unto the plaintiffs in the second-mentioned suit the costs of this application, to be taxed, &c.

Reg. Lib. A. 1821, fol. 2565.

Powell *v.* Lassalette.

Jacob, 549.

The contents of documents set forth in the schedule to the answer, in an injunction cause, may be obtained before the dissolution of the injunction, and used to oppose the motion to dissolve it.

Hence, when the injunction has been dissolved, and the plaintiff afterwards, by inspecting the documents referred to by the answer, discovers new matter, he cannot move to revive the injunction upon an amended bill containing the new matter, and verified by affidavit.

July 13, 1822.

IN this cause an injunction to stay proceedings at law had been obtained for want of an answer. On a motion to dissolve it, made upon the coming in of the answer, it was ordered that the injunction should be continued till the 1st of February, upon the plaintiff giving security for what might be found due; and the plaintiff in the meantime was to be at liberty to inspect certain books and papers set forth in the schedule to the defendant's answer, and admitted to be in his possession at his residence at Oleron, in France. The plaintiff having by the inspection of these documents obtained information considered to be material, amended the bill by introducing the new matter thus disclosed. The defendant being in contempt for want of an answer to the amendments, a motion was made to revive the injunction, upon an affidavit verifying the amendments.

[Powell *v.* Lassalette.]

Mr Hart, for the defendant, objected to the reading of the affidavit.

Mr Heald and Mr Koe, for the plaintiff, contended, that when after the answer and after the dissolution of the injunction, new matter was discovered by the plaintiff, the course was to amend, and upon the defendant being in contempt for not answering, to move to revive the injunction, upon affidavits supporting the amendments. Norris *v.* Kennedy, 11 Ves. 565.

The Lord Chancellor. I think the proceeding ought to have been of a different nature. The bill inquired for these books and papers as part of the discovery sought for; and when you charge that in those books and papers there are matters by which the truth of the statements in the bill will appear, you do it with a view of showing that they contain matters such that the injunction ought not to be dissolved. There are two ways of giving a discovery of what is in the papers; the first is by putting their contents in the answer; the other, which is more common in practice, is to put them in the hands of the clerk in court, or to give liberty to the plaintiff to inspect them at the defendant's house. If the disclosure is made in the first way, it is part of the answer; if in the other way, it is also part of the answer, though, to save expense, it is not put upon the record.

Then when the injunction is sought to be dissolved, you are to show a case against it, upon the contents of the answer, and upon what appears in the books and papers, which is *quasi* on the record. I have frequently allowed motions to dissolve injunctions to stand over till the books and papers were inspected. After the inspection, the motion may come on upon what is found in the books, which, when it is inconvenient to bring the books themselves into court, may be stated at the bar if it be admitted, or if not, it may be stated by affidavit; it then becomes part of the answer upon which the court will decide as to the injunction. And if an affidavit be made that such and such things appear from the books, and the defendant should dispute it, or should object to the affidavits being read, the court would not allow the injunction to be dissolved till they should bring the books into court. But if the plaintiff lets the injunction be dissolved, before he has enforced a discovery of the books and papers, can he afterwards say that he would not support the injunction without amending his bill, when the bill charges that if he had those books and papers he should be able to support it?

It is an obvious principle, that a party coming for an injunction should state his whole case, and as soon as he can; nothing could be worse than to allow him, after having a full answer, to amend the bill before agitating the question whether the injunction is to be continued on the merits. If it be said that upon the discovery of new matter after the dissolution of the injunction, the plaintiff may apply again in this manner, I do not deny that it may be so; but if he charges, that by certain books such and such material things will appear, it is his own fault if he does not get at them before the injunction is dissolved. The amended bill is entirely on a mistake; you should have opposed the dissolution of the injunction.

Richardson *v.* Smallwood.

Jacob, 552.

A suit to set aside a settlement as fraudulent against creditors, entertained, where the plaintiff subsequently became a creditor by the breach of a covenant previously entered into by the settlor.

Where a deed is set aside as fraudulent against creditors, the property becomes assets, and subsequent creditors are let in.

In order to make void a deed as fraudulent against creditors, it is not necessary to prove that the party was insolvent at the time, if it appear that the intention was to delay creditors.

Rolls.—July 12, 15, 1822.

THIS suit was instituted by the plaintiff on behalf of himself and the other creditors of Isaac Froome, deceased, for the purpose of setting aside a voluntary settlement made by him. The settlement was dated in May 1795; Froome died in April 1797. The plaintiff some years after became a creditor under a covenant in a lease previously granted to him by Froome, for breach of which he brought an action against Froome's personal representative, and recovered damages, to be levied of his goods. Soon after, in April 1816, he filed the bill.

The settlement in question was made between Froome of the one part, and two trustees of the other part. It recited that he had, by indenture of March 1780, made such provision as therein mentioned for the sole and separate use of Ann his wife during her life, and that he was minded and desirous, and had agreed to assign the several messuages, tenements, and other things therein mentioned, upon the trusts therein mentioned. He then assigned to the trustees the messuage called the Grand Hotel in Covent Garden, and several other houses, and also his share and interest in a newspaper called the County Chronicle, upon trust to permit him to receive and take the rents, issues, and profits for his life, and after his death, in case his daughter A. M. Smallwood should be then living, upon trust for her separate use for her life, and after her death, upon trust for her children, to be equally divided between them at twenty-one or marriage, and if there should be no such children living at her death, or they should die before twenty-one or marriage, then upon trust as to one moiety for W. Smallwood her husband; and as to the other moiety for Isaac Froome the younger, for life, with the remainder to his children, and in default of such issue, then in trust for Ann Payne, (a niece of Isaac Froome the settlor) for her life, with remainder to her children, and in default of such issue in trust for Sarah Woodhatch, also a niece of Froome's. This deed was duly registered.

Froome made a will, and appointed executors, who died in his lifetime, and letters of administration with the will annexed were granted to his daughter A. M. Smallwood. She died in 1809, leaving two infant children, and W. Smallwood her husband, to whom administration *de bonis* [illegible] Froome was granted.

[illegible] charged that Froome at the time of executing the settlement [illegible]bted and embarrassed, that the settlement was made for the

purpose of defrauding his creditors, and evidence was entered into on both sides with reference to this part of the case.

It appeared that the testator was entitled to the lease of the house called the Grand Hotel (in which he carried on business) subject to a mortgage for 1000*l.*; and another of the houses included in the settlement he had mortgaged for 200*l.*: only secondary evidence of these mortgages was given; the original instruments not being produced. The testator had quitted the hotel in 1793, and let a coffee-room under it to the plaintiff. He afterwards lived chiefly in the country, and, as some of the witnesses stated, his residence was not generally known, being concealed, owing to the embarrassed state of his circumstances; it was also stated that about the year 1793 he was in the habit of borrowing small sums of money, and on one occasion said that he had bills coming due, and did not know how he should get money to pay them. He was at the time of executing the deed indebted to two female servants for arrears of wages, for which he gave them promissory notes, and on application being made to him on the part of one of them for payment, he stated that his affairs were not settled, and that he was too ill to settle any thing. In September 1795 he borrowed a sum of money of the plaintiff, which the latter was to pay himself by retaining his rent. Smallwood, the administrator, had an inventory exhibited in the ecclesiastical court in the year 1811, including the hotel and other premises assigned by the deed as part of the testator's property. On the other hand it was stated in the evidence of Smallwood (who was examined under an order), that at the time of the execution of the deed, the testator was possessed of other property not included in it, consisting of furniture, plate, wines, carriages, and book debts, to the amount of between two and three thousand pounds. He had previously, by a power of attorney, authorized Smallwood to act generally for him, and the latter said that he had by virtue of it, in the course of 1793 and 1794, paid all the debts that came to his knowledge; he, and some other witnesses, also denied that there had been any concealment with respect to the testator's place of abode. The testator executed the deed in the evening at an inn in London, and on the following day went into the country.

Mr Wingfield and Mr Hazlewood, for the plaintiff.

The object of the suit is to set aside the settlement in question as being fraudulent against creditors within the statute 13 Eliz. c. 5. The evidence shows that the settlor was much indebted at the time, and embarrassed in his circumstances. The settlement was without consideration, and not called for by any particular occurrence in his family; he continued in the receipt of the rents and profits, and it is not clear that he possessed any other property. This is sufficient to convince the court that the object of the settlement was to withdraw his property from the power of his creditors. It is not necessary, in order to invalidate a settlement, to show that the party was actually insolvent at the time, the state of his affairs being only a circumstance tending to show a fraudulent intention; if made with a view to future debts it is equally fraudulent. Stileman *v.* Ashdown, 2 Atk. 477, 481.

The plaintiff's debt arises from a breach of covenant, and though subsequent in time to the settlement, is sufficient to entitle him to be relieved against it. In Fitzer *v.* Fitzer, 2 Atk. 511, the plaintiff's right arose after the settlement; and in Taylor *v.* Jones, 2 Atk. 600, it was decided

that debts subsequently contracted are within the statute(*a*). The cases of Walker *v.* Burrows, 1 Atk. 93, and Holloway *v.* Millard, 1 Madd. 414, were also cited.

Mr Shadwell and Mr Roupell, for the defendants, urged the length of time between the testator's death and the filing of the bill, as one ground for the court's withholding its assistance, and objected to the insufficient evidence of the debts. They relied on Lush *v.* Wilkinson, 5 Ves. 384, as deciding that to avoid the settlement the party must be shown not only to be embarrassed, but to be indebted to the extent of insolvency. Here, however, there was evidence of his having other property: and the chief part of the debts alleged were secured by mortgage, and ought not, therefore, to be regarded for this purpose(*b*). They argued that it was now understood to be the rule that such settlements were only to be considered fraudulent against creditors at the time(*c*), and that therefore the plaintiff's debt being subsequent in point of time would not sustain the suit.

The Master of the Rolls during the argument observed, that the statute declared the deed void as against those creditors whose actions, &c. were or might be hindered or delayed, and that created a question how far it applied to subsequent creditors. I do not recollect any instance of validity being given to a settlement where the party was largely indebted at the time, and subsequent creditors have applied for relief. All the cases say that the deed will stand if the party be not indebted, and if it be not fraudulent. Being indebted is only one circumstance from which evidence of the intention may be drawn. But suppose a person indebted to execute a conveyance such that if those who were creditors at the time complained, it would be void as against them: then if they are paid off, and a new set of creditors stand in their places, does that make any difference? Does it not hinder and delay these creditors, and is it not void as against them? If it be not so, it would be easy to evade the statute: the party may pay off those to whom he is then indebted by borrowing of others, and he may then say to them: I did not make the settlement to defraud you, but to defraud the other persons who were my creditors. Here there are strong circumstances indicating embarrassment: and some of the debts which the testator then owed are still existing. If the conveyance cannot be invalidated on the ground of the debts alone, the question will be whether it was made for the purpose of defrauding creditors. No doubt if the party be not indebted at the time, the onus of proving the fraud is thrown on the other side: for he may fairly intend to give away his property; but still it may be fraudulent as contemplating future debts.

One point to be considered is, how it stood at the time of his death. It has never been determined, that in order to make void the deed any creditor should be actually hindered or delayed: the statute speaks of those who may be hindered. Then was not this deed void as against those of his creditors who continued so at his death? If so, it is settled that all creditors may take advantage of it. It becomes part of the assets; and nothing since that time could alter it.

At the close of the argument, his honour delivered his opinion to the following effect:

Rider *v.* Kidder, 10 Ves. 360, 370.

Olive, 2 Bro. C. C. 90. (*c*) See Kidney *v.* Coussmaker, 12 Ves. 155.

[Richardson *v.* Smallwood.]

The plaintiff has, I think, failed in proving the principal debts; but it is satisfactorily established that there is sufficient ground for an inquiry into those facts: and supposing those debts to be proved, I am of opinion that there is enough to defeat the settlement. I do not conceive it necessary to show that the party was insolvent. The question is, whether the court is satisfied that the deed was within the purview of the statute; that it was made to hinder and delay his creditors, by placing the property out of their reach; and considering the situation of this person at the time, I cannot hesitate to believe that his purpose was to secure this property for himself and his family.

He appears to have been distressed at the time: and what induced him to execute this deed? Was there any thing that called for it; any change in his family, or any other property come to him; was there any thing, in short, but the apprehension that it might go to his creditors? The deed recites that his wife was already provided for; it was not therefore required for her. The leaseholds were already mortgaged; and when in the same year he borrowed money of the plaintiff, he could not secure it except by letting him gradually repay himself out of his rent. In a short time after he died; what passed for some years after his death does not appear; but it seems that Smallwood, the administrator, had so little idea that the deed could stand, that he included the property in question in the inventory, as constituting part of the assets of the deceased.

It is attempted to be made out, though in a suspicious manner, that he had some other personal property besides what was included in the settlement; but no notice was taken of it in the inventory, nor does it appear what has become of it. All the circumstances are those of a person necessitous and largely indebted.

There is no case circumstanced like this, where the settlement has been held good, even if the plaintiff was not a creditor at the time. But here, supposing the mortgages to be proved, there is a continuance of debt from that time to this; and if it be once shown that it is a deed which, as against any of the creditors, cannot stand, then the property becomes assets, and is applicable to the payment of debts generally; all the creditors come in at whatever times their debts may have arisen. That is decided. At present, as the debts are not in strictness proved, I can only direct inquiries.

Reg. Lib. B. 1821, fol. 2009.

Ex parte Burgess, in the matter of Hardy and Dale, Bankrupts.

Jacob, 559.

BANKRUPT bringing an action to try the validity of the commission, cannot, at the same time, proceed with a petition to supersede it, on the same grounds(*a*).

July 16, 1822.

(*a*) Ex parte Price, Buck. 230.

Bearblock *v.* Tyler.

Jacob, 560.

THE tithe of calves is to be set out when they are fit to be weaned, and to live alone on the same food with the cow.

The proper mode of tithing hay is by the fork and rake.

The rule, that involuntary rakings are not titheable, does not extend to hay.

The verdict on the first trial of an issue in a tithe cause being for the defendant, in consequence of a misdirection of the judge, and on the second trial being for the plaintiff, the costs of the suit, of the motion for a new trial, and of the second trial, given against the defendant, but no costs given of the first trial.

Rolls.—May 17, 1821; January 2, July 22, 1822.

Marsack *v.* Farlow.

Jacob, 572.

In a suit to set aside *post-obit* securities, an injunction being granted, the principal and interest will be ordered into court, and will not be payed to the defendant.

July 24, 1822.

THIS was a bill to set aside a *post-obit* bond. An injunction had been obtained, upon the plaintiff paying into court the sum originally advanced by the defendant, with interest.

Mr Hart, on the part of the defendant, now moved that this sum might be paid out to the defendant, or that the injunction might be dissolved. He observed that there could be no dispute about the right, for whatever might be the result of the suit, the defendant must at least be entitled to this sum; and mentioned, that in a late case of a similar nature, Marsack *v.* Jackson, the money had been paid out to the defendant.

Mr Heald and Mr Keene, on the other side.

The Lord Chancellor. This is not according to the rule of the court. The court will not pay money out to the defendant at the institution of the suit. The plaintiff will not dispute your right to the money if he succeeds in the suit; but he disputes your right to receive the money back unless he obtains a decree for setting aside the bond. I remember the order in the other case very well; it was by consent. I should not have made it without.

Motion refused with costs.

Johnes *v.* Claughton.

Jacob, 573.

Where a receiver is in possession, other persons not permitted without the leave of the court to enter, under a claim of a right of common not previously exercised.
July 25, 1822.

MR HART and Mr Simpkinson moved that one Morgan might stand committed for a contempt, in trespassing on the estate in question in this cause, which was in the possession of the receiver.

It was stated by affidavit, that Morgan had turned his cattle on part of the estate, claiming a right of common; the receiver had impounded them; he replevied, and persisted in the trespass. The estate had been for some years inclosed and let. Notice of the motion had been served on Morgan, but he did not appear.

The Lord Chancellor. If at the time when the receiver was appointed, this person had been in the exercise of the right of common which he claims, the appointment of a receiver could not be understood to interfere with that exercise. On the other hand, if that was not the case, the court will not permit him, without leave, to exercise an alleged right of common abandoned for several years; and here I understand that the estate had been inclosed for some years, and let as an inclosed farm. But I do not know whether it would not be going too far to commit him at once; the better way will be to restrain his action, and to make an order upon him not to trespass again(*a*).

His lordship doth order that R. Morgan be restrained, by the injunction of this court, from turning cattle into the farm called C. in the plaintiff's bill mentioned; or exercising any right of common on the estate in question in this cause, or doing any act to disturb the possession or enjoyment of the tenant of the said farm, until the further order of this court. And it is ordered, that he also be restrained from taking any step in the replevin action brought by him for distraining cattle trespassing upon the said farm, until the further order of this court. And it is ordered, that the said R. Morgan be at liberty to go in before the Master and be examined *pro interesse suo*, as to the said farm and right of common; and for that purpose it is ordered, that the plaintiff do forthwith exhibit interrogatories before Mr C. one, &c. for the examination of the said R. Morgan.

Reg. Lib. A. 1821, fol. 2562.

(*a*) See Angel *v.* Smith, 9 Ves. 335.

Hill *v.* Fulbrook.

Jacob, 574.

In a suit for a partition and an account, the defendant improperly disputing the plaintiffs' title, ordered to pay so much of the costs as related to the account, and to the proof of the plaintiffs' title.

Rolls.—July 25, 1822.

THIS was a bill by the three daughters of T. Fulbrook deceased, against their brother, claiming to be tenants in common with him, in certain estates of which he was in possession, insisting that he was solely entitled: it prayed a partition, and an account of the rents and profits. The decree declared the plaintiffs and the defendant to be entitled as tenants in common, and directed inquiries and an account of the rents and profits. The cause now coming on for further directions, the accounts were directed to be carried on, and a partition was decreed; the only question was that of costs.

Mr Roupell, for the plaintiffs, argued, that the suit having been occasioned by the defendant's unjustly disputing their title, the costs ought to be thrown upon him.

Mr Wingfield and Mr Skirrow, for the defendant.

The Master of the Rolls said, that so far as it was a suit for a partition, if there was no more expense incurred than what would be necessary in a simple partition, the costs must follow the usual rule; but if any additional costs were occasioned by the plaintiffs proving their title in consequence of the defendant disputing it, the defendant must pay them. The account of the rents and profits was rendered necessary by his improperly resisting the plaintiffs' claim, and, therefore, so much of the costs as related to the account must be borne by him.

His honour doth order, that it be referred to the Master to tax the plaintiffs their costs of this suit to this time, in the doing of which the said Master is to distinguish how much thereof has arisen from the said W. F. setting up an exclusive right to the whole of the property in question in this cause, and of taking the account already taken, and make a separate report thereof; and it is ordered, that so much of the said costs as shall appear to have arisen from the said W. F.'s setting up an exclusive right to the whole of the property in question in this cause, and of taking the account already taken, be paid by the said W. F. to the said plaintiffs.

Reg. Lib. A. 1821, fol. 2547.

Cox *v.* Champneys.

Jacob, 576.

A mortgagee of a West India estate not taking possession, will not be appointed consignee by the court, unless the mortgage-deed contains a covenant for that purpose.
July 27, 1822.

THE plaintiff was the second incumbrancer upon an estate of the defendant Sir T. S. Champneys, situate in the West Indies. The defendants J. and P. Vaughan were the first incumbrancers. An order had been made on the first of June last by the Vice-Chancellor, upon the motion of the plaintiff, and upon the consent of the defendants J. and P. Vaughan, for the appointment of a manager and consignees, and the defendants J. and P. Vaughan were to be at liberty to propose themselves as consignees. A motion was now made, on the part of the defendant Sir T. S. Champneys, to discharge this order, upon the ground that the plaintiff's securities were impeached by the answer.

Mr Hart and Mr Wakefield, in support of the motion.
The Attorney-General, Mr Horne and Mr Wilbraham, against it.

The Lord Chancellor refused the motion; but said, that if the defendant chose to oppose it, the first mortgagees could not be appointed consignees, and, therefore, that part of the order which allowed them to propose themselves must be varied. They may, if they please, take possession. They may make it part of the contract that they shall have the consignments; but I am of opinion that if a mortgagee of a West India estate has not a contract that he shall have the consignments, and if he does not take possession, he cannot have any such emolument from the estate. If that were allowed, the second mortgagee would move for a receiver and consignee, and the first mortgagee would be appointed, and thus circuitously obtain an advantage, which he could not have obtained directly(*a*).

His lordship doth order that the order made in this cause, bearing date the 21st day of June 1821, be varied by omitting the words "and the said defendants J. V. and P. V. are to be at liberty to propose themselves before the said Master to be appointed such consignees;" and it is ordered, that the said order of the 21st day of June 1821 be without prejudice to the said J. V. and P. V. taking possession of the said estate and premises, in case they shall be advised so to do.
Reg. Lib. A. 1821, fol. 2501.

(*a*) Bunbury *v.* Winter, 1 Jac. & Walk. 255.

Benson *v.* Chester.

Jacob, 577.

A plaintiff cannot obtain leave to examine a co-plaintiff as a witness, on giving security for costs. July 27, 1822.

A DECRETAL order had been made in this cause, directing an inquiry as to what was due to the defendants upon a bond, and enjoining them from proceeding on it in the mean time. An order was afterwards made by the Vice-Chancellor on the 11th of July, upon the motion of the plaintiffs, A. Benson and J. Benson, giving them leave to examine the other plaintiff, J. Smith, as a witness on the reference, upon their giving security to be approved by the Master for the payment to the defendants of such costs as the plaintiffs might be ordered to pay to the defendants in the progress of the suit. A motion was now made on the part of the defendant to discharge this order.

The Attorney-General and Mr Roots, in support of the motion.

It is a general rule that one plaintiff cannot be examined as a witness for the others, Casey *v.* Beachfield, 1 Eq. Ca. Abr. 225; Phillips *v.* Duke of Buckingham, 1 Vern. 230; Mayor and Aldermen of Colchester *v.* ———, 1 P. W. 595; Hewatson *v.* Tookey, 2 Dick. 799. In the last of these cases, the decision in Troughton *v.* Getley, 1 Dick 382, by which a defendant was allowed to examine a plaintiff, was reprobated(*a*). The indemnity from costs which the order attempts to give to this plaintiff is ineffectual: the defendants may nevertheless have recourse to him if the costs should be given against the plaintiffs. This continuing interest in the costs is an objection which cannot be got over. Vaughan *v.* Worrall, 2 Swan. 395.

Mr Horne, on the other side, stated, that the plaintiff Smith was insolvent, and there was therefore no probability of the defendants resorting to him for costs, and that the tendency of his examination would be to diminish his estate. It would be a great hardship on the other plaintiffs to be deprived of his testimony, as they might, if this decretal order had not been made, have moved to strike his name out as a plaintiff, and make him a defendant.

The Lord Chancellor. I apprehend that when a plaintiff moves to strike out the name of a co-plaintiff, and make him a defendant, if the court makes the order, the defendant who was a plaintiff can never be again involved in the costs with the remaining plaintiffs.

If the order for the inquiry gives the plaintiff a right to examine a co-plaintiff, this second order is unnecessary. If it does not, the question is, whether it is according to the practice to make such an order. No general rules of practice can be made that will not be harsh in some particular instances, but still it is better to adhere to them for the sake of preventing general mischief. This order does not alter the plaintiff's character as to

(*a*) See Bird *v.* Owen, Mose. 312; Armiter *v.* Swanton, Amb. 393; Walker *v.* Wingfield, 15 Ves. 178.

liability to costs. It requires the other plaintiffs to give security for such costs as all the plaintiffs may be ordered to pay: but if the plaintiffs should be ordered to pay costs, how do we know that the defendant may not say that he does not care for the security; that he has an order for all the plaintiffs to pay, and that he will enforce that order against whichever of them he pleases, without going into actions upon the security? It is said that if this decretal order had not been made, Smith might have been made a defendant, and then examined; but if the parties choose to take a short order of this sort, they are then in the same situation as if they had gone to a decree with all these persons plaintiffs.

Lord *v.* Wormleighton.

Jacob, 580.

A solicitor discharged by his client or his representatives is not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not being paid.
July 27, 1222.

THIS was a creditor's suit. The defendant Wormleighton, the executor, having died, the suit was revived against his representatives. At the time of his death, the papers in the cause, and his documents and vouchers relating to it, were in the hands of his solicitor; who now retained them, claiming a lien, his bill of costs not having been paid by the present defendants, who employed a different solicitor. They now moved that the former solicitor might be ordered to permit inspection of the papers and documents, and to produce them when necessary for the purposes of the cause. The motion had been made before the Vice-Chancellor, who declined making the order, and wished it to be moved before the Lord Chancellor.

Mr Wetherell and Mr Roupell, in support of the motion, cited Ross *v.* Laughton, 1 Ves. & B. 349, and Commerell *v.* Poynton, 1 Swan. 1, ruling, that whether the solicitor leaves his client, or is discharged by him, he cannot refuse to allow the papers and documents to be used for the purposes of the cause, for which alone they were put into his hands. Having a lien on the fund, he will himself be benefited by the production. They stated that without these papers the defendants would be unable to make out their discharge, and alluded to the case of Georges *v.* Georges, 18 Ves. 294, where the Lord Chancellor was of opinion that the solicitor's lien could not extend to the original will of his client.

Mr Horne, on the other side.

This is not a case like Commerell *v.* Poynton, where the solicitor spontaneously retired from the cause; the client's representative having ceased to employ him in it. His lien on the papers is undoubted, and the question is, whether that lien is to be rendered useless by qualifying it in the manner proposed. The papers are of no value except for the purposes of the cause, and if the solicitor is to produce them whenever they are required for those purposes, the right of retaining them becomes merely nugatory. Whenever any use can be made of them he must deliver them

up, and when they are of no use he may keep them. For all practical and beneficial purposes the client has them. Can it be right that he should be at liberty to change his solicitor, after he has laid out considerable sums in the cause, and without paying him, have all the benefit of the papers? If the lien is to subsist, it must be made effectual, so as to give the solicitor a substantial security.

The Lord Chancellor. I have no conception that it is possible to argue that a solicitor having made a will for his client, has any lien upon it. He engages to make an instrument effectual for the purposes of the testator, which it cannot be unless it is produced elsewhere. There is no pretence for any lien. So I have no doubt that where a solicitor discharges himself, he cannot prevent his client from having the use of the papers; for when he begins the cause, I apprehend that he engages to continue to act till the end of it; and I remember Mr Justice Heath and Mr Justice Buller said, that if he did not go through with it, instead of having a lien, he could not bring an action for the bill(*a*).

This case is very important, and I shall take an opportunity of consulting with the Master of the Rolls and the Vice-Chancellor upon it. The executor employed this solicitor till his death; his representatives now employ another; and the question is, whether I am bound to say, not that he has no lien upon the papers, but that it is so modified that he may hold them against all the world except for the purposes of this cause, and that he is only to have a lien on the fund when it is wound up; or whether he has a right to say that he shall not be discharged, and have the papers taken away, without being paid. And considering how much a solicitor must now disburse if the client does not pay him at the time, it comes to be a very serious thing to say that the client shall be able to discharge a solicitor, who has carried on the cause at a great expense, without paying him.

It is said, that if he produces the papers in the Master's office, he derives the same benefit from them as if he continued in the cause; but I doubt that: he may say that with respect to the fund he would rather trust to his own exertions than to those of another.

He may transfer the papers to the new solicitor, the latter paying the bill of costs, and taking the benefit of the lien. And as he has a right to bring an action for his bill, and as he may thus transfer to the solicitor coming into his place the benefit of the lien, I think it would be a greater hardship on him to make him produce them than upon the client to refuse it. My present impression is, that he ought to be able to make use of the non-production of the papers in order to get at what is due to him. I am now stating an opinion, contrary to what I thought at the time when the cases cited were before me. I think it is better that the point should be settled, and I shall therefore consider of it with the Master of the Rolls and the Vice-Chancellor.

The motion was afterwards refused.

(*a*) See 14 Ves. 273.

Horridge *v.* Ferguson.

Jacob, 583.

Gift to such of the children of A. B. C. as should be living at the testatrix's death, or the issue of such of them as should be married, in equal shares.

The word *or* construed to mean *and*, and the children and grandchildren held to be equally entitled.

Rolls.—July 30, 1822.

ANN POWNALL, by her will dated in June 1814, after giving several legacies, directed the residue of her property to be divided amongst such of the children of Thomas Henley, Mary Henley, William Henley, Elizabeth Henley and James Henley, as should be born in lawful wedlock, and living at her decease, or the issue of such of them as should be married, in equal shares and proportions, as and when they should arrive at their respective ages of twenty-one years, or day or days of marriage, which should first happen.

At the time of the death of the testatrix, there were two children of Thomas Henley living; he had also had a son who had died leaving five children, and a daughter who died leaving two children: these were all living at the death of the testatrix. Mary Henley had one child, William Henley two, and Elizabeth Henley one, all of whom were living at the death of the testatrix, but who had no children. James Henley died before the testatrix, unmarried. The residue having been ascertained under the decree in this cause, a petition was presented, praying that it might be divided into four parts; one part to be paid to the child of Mary Henley, one to the child of Elizabeth Henley, another to the children of William Henley, and another to the children and grandchildren of Thomas Henley.

Mr Horne, for the petitioners.

Mr Roupell, for the grandchildren of Thomas Henley, contended that the word *or* must be construed to mean *and;* and that the children and grandchildren were therefore equally entitled. He cited Richardson *v.* Spraag, 1 P. W. 434; Read *v.* Snell, 2 Atk. 642, and Longmore *v.* Broom, 7 Ves. 124.

The Master of the Rolls. There is certainly some ambiguity about this bequest. The general rule is to adhere to the grammatical interpretation; but where the effect of that will be to make the meaning uncertain, the court has gone to the extent of converting these words *or* and *and* into one another. The gift to such of the children as should be born in lawful wedlock, and living at her decease, would make them all take, *per capita*, in equal shares. It then proceeds, "or the issue of such of them as should be married." If the grammatical construction be given to this sentence, it means that the issue are to take, instead of their parents, in some event which is not expressed. To say that they are to take in the event of the parents being dead, would be to insert other words, and I think that the court cannot introduce such a qualification to the bequest. All that the will requires to entitle them to participate is,

that they should be the issue of such of the children as are married. All the children and grandchildren must, therefore, take equally.

The case very much resembles that of Richardson *v.* Spraag, and the same reasoning applies. By understanding the word *or* grammatically, you cannot make sense of the passage without inserting something else; but by using that latitude of construction which, in such cases, the court is in the habit of resorting to, and converting it into *and*, the whole is made consistent, and all the members of the family are let in.

Reg. Lib. A. 1821, fol. 2068.

Leng *v.* Hodges.

Jacob, 585.

A fund paid out to persons entitled to it subject to the contingency of a female of advanced age having children, on their recognizance to refund in case of that event happening.

Rolls.—August 1, 1822.

UNDER the will of Charles Leng, and the decree and several orders made in this cause, the defendant Mary, the wife of Thomas Bailey, was entitled to the dividends of a sum standing in the name of the accountant-general, which, in the event of her dying without leaving any child or children who should arrive at the age of twenty-one, was to devolve upon the plaintiffs. She had had two children who died young, and she was now of the age of sixty-nine years. The plaintiffs having agreed with the defendants Thomas Bailey and his wife for the purchase of the life-interest of the latter, a petition was presented praying a transfer of the fund in question to them.

Mr Roupel, in support of the petition, mentioned, that orders had frequently been made for transfers of sums, the right to which depended on the contingency of a female dying without issue, in cases were she was of an advanced age.

The Master of the Rolls said that orders of that description had sometimes been made, upon the parties giving security to refund the money in the event of any children being born; but he thought that the court would not venture to act upon these probabilities without requiring security; and upon the case of Fraser *v.* Fraser(*a*) being mentioned,

(*a*) Fraser *v.* Fraser, Rolls, 30th November 1814.—J. Fraser, by his will, bequeathed the residue of his property to Margaret Fraser, to be paid and payable on the day of her marriage, and settled upon herself and her issue; but in the event of her death before marriage, the residue was to devolve upon the two youngest children of Ann Macdonnell, in equal shares. The testator died in 1800: his executors invested the residue in the purchase of 1750*l.* consols, and Margaret Fraser not having married, they suffered the dividends to accumulate to the amount of 545*l.* The bill was filed against the executors by Margaret Fraser and the two youngest children of Ann Macdonnell, stating, that the former was still unmarried, and fifty-five years of age, and that they had agreed upon a division of the fund between them, and praying that it might be transferred to them; and it submitted, that if a transfer should not be directed, the

[Leng *v.* Hodges.]

where a similar order was made upon the recognizance of the parties, he thought that would be sufficient.

Reg. Lib. B. 1821, fol. 1749.

Farquharson *v.* Balfour.

Jacob, 587.

After an answer has been reported insufficient, an order to amend, and for the defendant to answer amendments and exceptions together, prevents the defendant from taking exceptions to the report, if it be served before the exceptions are set down.

July 24, 27, Aug. 3, 5, 1822.

EXCEPTIONS having been taken to the defendant's answer, the Master, on the 26th of February, reported it insufficient. On the 11th of March the plaintiff obtained an order for leave to amend, and for the defendant to answer the amendments and exceptions together: this order was not served on the defendant till the 3d of May. The defendant, on the 2d of May, filed exceptions to the Master's report; and on the 4th of May obtained an order for setting them down: this order was served upon the plaintiff a day or two after.

Mr Agar, on the part of the plaintiff, now moved that the exceptions might be taken off the file, and that the order for setting them down might be discharged; contending that they were irregular, in being filed after the order for answering amendments and exceptions together.

Mr Hart and Mr Daniell, for the defendant, urged, that there was no particular time limited for filing exceptions to a report of insufficiency, and that the defendant might file them at any time, unless he had submitted to answer by obtaining an order for time, or unless an attachment

plaintiff Margaret Fraser was entitled to the accumulated dividends, and to the future dividends during her life. The cause was heard before the Master of the Rolls (sir W. Grant), and the following decree was made:

His honour doth declare, that the plaintiffs are entitled, subject to the contingencies of the plaintiff Margaret Fraser marrying and having issue, to the residue of the estate and effects of the said testator, John Fraser; and it being admitted, that the said Margaret Fraser is of the age of fifty-five years and unmarried, his honour doth order, that upon the plaintiff's entering into a recognizance, to be approved by the Master, to refund the 1750*l.* bank 3*l.* per cent annuities and 545*l.* cash, and the dividends accrued and to accrue on the said annuities, in case the plaintiff Margaret Fraser shall marry and have issue, it be referred to Mr Cox, one, &c., to tax all parties their costs of this suit, as between solicitor and client, in case the parties differ. And it is ordered, that the defendants do, out of the said 545*l.*, retain their costs, and pay to the plaintiffs their costs when taxed. And it is ordered and decreed, that they do transfer the 1750*l.* bank 3*l.* per cent annuities, and pay the dividends accrued thereon, and the residue of the said 545*l.* to the plaintiffs. Reg. Lib. A. 1814, fol. 83.

A similar order was made on petition in Stokes *v.* Smith, Rolls, 13th February 1824. Reg. Lib. B. 1823, fol. 449.

In Defflis *v.* Goldschmidt, 1 Mer. 417, 19 Ves. 566, the decree directed an inquiry, what sum would be proper to be set apart to answer certain legacies of 2000*l.* each given to the children of T. G. thereafter to be born: in making which inquiry, the Master was to have regard to the age of T. G. See also Payne *v.* Long, cited 19 Ves. 571.

for not answering had issued against him. The consequence of the rule, as insisted upon by the other side, would be, that a plaintiff, by using expedition in obtaining an order to amend and answer the amendments and exceptions together, might always prevent the defendant from taking the opinion of the court on the exceptions.

The Lord Chancellor. I think the question turns upon this: the Master reports the answer insufficient. Suppose you then move for leave to amend, and for the defendant to answer amendments and exceptions together, and having obtained that order, serve it on the defendant; I should think it very difficult to say that he could then file exceptions to the report, without applying to the court for leave to file them, and to have the order discharged. But as you had not served the order, I do not know whether the exceptions were not in time.

July 27.—Mr Agar mentioned that the order to answer amendments and exceptions together was served before the plaintiff's exceptions to the report were set down, before which time he contended that they were not regarded; and he cited Hall *v.* Mulliner, 2 Dick. 604, and Gildart *v.* Moss, 4 Ves. 617; also Mole *v.* Smith, 1 Jac. & Walk. 670, ruling that, until exceptions to a report are set down, they will not prevent its confirmation.

Aug. 3.—The Lord Chancellor. I have made inquiries as to the practice, and I understand, it is the unanimous opinion, that exceptions to a Master's report being carried into the office amounts to nothing; there must be an order to set them down. And if a motion is made for leave to amend, and for the defendant to answer amendments and exceptions together, and the order is made and served before the exceptions to the report are set down, the exceptions go for nothing. But if you get the exceptions set down before the order is served, then the order is too late.

Aug. 5.—The Lord Chancellor made the order as prayed, without costs.

Ex parte Clarke. In the Matter of the Dowager Duchess of Norfolk, a Lunatic.

Jacob, 589.

No jurisdiction in lunacy, after the death of the lunatic, to try the question of heirship; but in a case of disputed heirship, the possession was, under the circumstances, given to the parties reported by the Master to be the heirs at law.

A party claiming to be heir to the lunatic permitted, after the possession of the estates had been given up to the parties reported to be the heirs, to inspect deeds and documents remaining in the Master's office, which, it seems, may be retained till a proper investigation has taken place.

Dec, 22, 1820; Feb. 3, 1821; March 26, Aug. 5, 1822.

UNDER a settlement made in the year 1771, upon the marriage of the late dowager duchess of Norfolk, her real estates were limited after the

death of herself and her husband, and in default of issue, to her right heirs.

The commission of lunacy issued in April 1816, and on the 22d of June in that year the usual reference was made to the Master to approve of committees and to inquire who were the heirs at law and next of kin; and also whether it would be fit and proper that a receiver should be appointed of the real estates, and if so, to approve of a proper person. By a subsequent order advertisements were directed for persons claiming to be heir at law or next of kin of the lunatic, or claiming any estate or interest in reversion or remainder in her estates, to come in before the Master and make their claims. The Master appointed a receiver.

The Master reported that sir E. F. Stanhope, J. Parsons, Mary the wife of D. Burr, and Ann S. Davis, were the co-heirs of the lunatic. Claims were made before him on behalf of other persons, particularly by Robert Jackson, who contended that he was the heir at law of the lunatic, and went into evidence in support of his claim: it was stated by him that he understood from the Master that his decision as to the claims of the co-heirs would not be conclusive, except with reference to the appointment of committees, and that on that account he took no objections to the report, and suffered it to be confirmed without excepting. The earl Digby, sir E. F. Stanhope, and D. Burr were appointed committees of the person and estate: the receiver was continued.

The lunatic died in October 1820, without issue: upon which petitions were presented by the persons reported to be her co-heirs, praying that they might be let into possession of her real estates. Jackson was at this time abroad in South America.

Mr Heald appeared for Jackson, to oppose the petitions, and stated his absence from England, and that the time which had elapsed had not admitted of any communications with him since the death of the lunatic. In letters previously written he had spoken of returning, and it was believed that as soon as the intelligence of the lunatic's death reached him he would return to England, and prosecute his claim to the estates, although the persons who acted for him in this country were not authorized to undertake legal proceedings for that purpose. He contended that the Master's report could not be conclusive as to the title, and could have no effect except with respect to the management of the affairs of the lunatic during her life; the question of the right to these estates was open, and was now at issue, and the court ought not in the lunacy to do any thing that would prejudice the right of either of the contending parties. But it would be throwing great difficulties in the way of Jackson if the adverse party were to be put into possession; it would be placing them on very unequal footing in the litigation that must ensue: he therefore pressed that the order should be suspended, till there should have been an opportunity of communicating with Jackson.

Mr Hart, in support of the petitions, relied upon the Master's report, and urged that as the court must give up the possession to some one, and as it did not possess in lunacy any adequate means of trying the title, it must treat the persons reported by the Master as the real heirs.

The Lord Chancellor. The court has been in the habit of bringing before it the persons who would be the next of kin and the heirs at law, if the lunatic died at the moment, not for the purpose of trying their title, but for its own protection. It cannot, however, be said that the Master's

report is at all satisfactory ; for the parties may not put themselves to the expense of trying their right to an heirship that may turn out to be worth nothing : the report is not conclusive. I do not recollect any instance of disputed heirship at the death of the lunatic, and I do not know what the court has done in such cases.

February 3, 1821.—His lordship permitted the petitions to stand over from time to time, that Mr Jackson, if he should arrive, or his solicitor, might take any other steps, and might make a search amongst the documents in the Master's office : the solicitor, however, declined making any further search, and had not received any intelligence from Jackson.

The Lord Chancellor having previously said that he would dispose of the matter to-day, as it must be brought to a conclusion one way or the other, observed that he was in great difficulty. His jurisdiction in the lunacy was gone, but it did appear to him that he must consider the persons who had all along been treated as heirs to be entitled to the possession. Let the possession, therefore, be delivered to them ; but I have no objection to its being stated that it is to be without prejudice to the right of any other person. I have nothing to do with it except in two ways ; one on the question whether the committee should be allowed to retain the possession, setting up a title in himself : there I think I have jurisdiction, and I lately refused to permit a committee to do so. The other way in which I have jurisdiction is in ordering the possession to be given up to the reported heirs at law. I have jurisdiction also to direct that the receiver shall receive the rents in arrear ; and then my power is gone. I shall make this order, declaring that the court does not think proper to go into the question whether the one party or the other is entitled, and that the estates are to be given up to those who are the reported heirs ; and the receiver must have the possession so far as to be able to collect the rents.

Mr Sugden, on the part of the Hon. C. Fitzroy, stated that there was a question as to part of the estates, whether they were not his property, which it was proposed to have decided by a reference to the Master.

The Lord Chancellor said he had no jurisdiction in the lunacy to decide that question ; but upon the consent of all parties the reference was directed.

The order declared that the Lord Chancellor did not think proper to interfere in the question, whether R. Jackson, or the petitioners, were entitled to the real estates of the late duchess as her heirs or heir at law. It ordered the receiver to continue to act until the arrears of the rents and profits due at the time of the decease of the late duchess should be fully paid and satisfied ; and upon receipt thereof he was to deliver up the possession to the parties whom the Master by his report found to be the coheirs at law. A reference was directed as to the part to which the Hon. C. Fitzroy had laid claim.

March 26, 1822.—In the month of September 1821, Jackson returned to England. Shortly afterwards, a commission of bankrupt issued against him, and a petition was now presented by him and his assignees, stating that since the Master's report he had procured other evidence in support

of his title, and that further evidence might be obtained from an inspection of the deeds and writings which still remained in the Master's office, and praying that the petitioners might be put in the same situation as Jackson would have been in, if he had been in England at the time of the hearing of the former petitions; that they might have permission to inspect the deeds and writings, and make copies and extracts, with liberty to apply for further relief after inspection. The possession of the estates had been given up pursuant to the order of the 3d of February 1821.

Mr Heald, Serjeant Heywood and Mr Phillimore, for the petitioners, argued, that the claim of Jackson ought not to be prejudiced by the order made in his absence, and that it must be considered as giving the other parties only a qualified possession, subject to the further order of the court; the jurisdiction of which was not gone by the death of the lunatic. Ex parte Grimstone, Amb. 706. With respect to the documents in the Master's office, it was clear that the court had power. They also referred to Wigg *v.* Tiler, 2 Dick. 552. See Re Fitzgerald, 2 Scho. & Lef. 432.

Mr Hart, Mr Wingfield, Mr Shadwell and Mr Spence, on the other side, contended that after the possession had been delivered, there could be no jurisdiction in lunacy to agitate the question of heirship. The petition besides aimed at no specific relief, excepting with respect to the documents, the right to which must follow the possession of the estate; and so far as the petitioners were entitled to the inspection of them, they might obtain it by a bill.

The Lord Chancellor. This case comes before me under singular circumstances. The petitioners pray that they may be at liberty to inspect the deeds and writings in the Master's office, and to take copies or extracts, and that they may be placed in the situation in which Jackson would have been if he had been in England at the time of the death of the duchess, and that they may be at liberty to apply for further relief, after they shall have inspected the deeds and writings. But as they do not point out what they mean to ask afterwards, it does not appear to me necessary to consider any thing but the documents. They are still in the Master's office, and cannot be got out without a petition, and upon such a petition the same question would arise; for I do not admit that I intended to decide the right to the title deeds.

The principle which leads the court to call for the next of kin and the heir at law of lunatics, is to receive from the persons probably entitled, that assistance in the protection of the property which persons having such expectant rights will be likely to afford; but the inquiry is not considered to be binding. For if one of the committees had died, the grant being joint, the committeeship would have been ended, and it would have been necessary to have an order for a new appointment, which would have contained a direction to inquire who were then the heirs at law and next of kin; and Jackson might have come in under that order, and have raised the same question again.

I still think the order with respect to the delivery of possession was right. It does not declare the rights of the parties, but I thought that the receiver ought not to retain the possession longer. My present opinion is, that the reported heirs are not entitled to have the deeds and writings out of the office, on the ground of that order; and I think that the

petitioners ought to be allowed to inspect them, without taking copies; and that I ought not to part with them till that has been done.

The order directed that the petitioners should be at liberty by themselves, their counsel, solicitors, and agents, to inspect the title deeds, evidences, documents and writings relating to the estates of the lunatic, deposited in the office of the Master; that they should be allowed six weeks' time for that purpose from the first day of Easter term, and should then be at liberty to apply again.

Aug. 5.—Another petition was now presented by Jackson and his assignees, stating, that in the course of the investigation it had been discovered, that it would be material to ascertain who was the mother of sir John Scudamore, afterwards viscount Scudamore, of Holm Lacy, son of Sir James Scudamore, both parties claiming through him; and it being one of the questions, whether he was the son of the first or of the second wife of Sir James; and that as the parish registers were in many respects inaccurate and obliterated, it would be important to have access to the family vaults in the church of Holm Lacy, in order to inspect the plates and inscriptions on the coffins of the Scudamore family, especially on that of viscount Scudamore. They had applied for that purpose to the vicar and to the chancellor of the diocese, who had refused, unless the consent of the representatives of the family could be obtained. Application had been made to sir E. Stanhope and the other persons reported heirs, for their consent, which they had declined to give. The petitioners prayed liberty to inspect the vaults and coffins as against Sir E. Stanhope and the other reported heirs; and that they might be restrained from opposing any obstacle to the petitioners making such inspection.

Mr Heald and Mr Phillimore, for the petitioners.

Mr Hart, Mr Wingfield, Mr Shadwell and Mr Spence, on the other side.

The Lord Chancellor, after recapitulating the previous proceedings, said, that upon the occasion when this was last before him, he thought that as the deeds were still in the Master's office, he had authority to order an inspection of them, and stated that his object was that it might be established who was the heir at law, and then either to make an order affecting the estates, or if he had not jurisdiction to do that, to make such order as might be proper with respect to the title deeds.

It is clear that the search now desired may furnish very material evidence. It is a different question, whether I have jurisdiction to order the parties not to oppose it. I confess I feel great difficulty about making such an order; but this I can say, that I do not think I shall let the title deeds out of the office, unless in some way this inspection is obtained; and perhaps I may be able to do something as to the estates. Therefore let the petition stand over, and try what can be done.

Williams *v.* Piggott.

Jacob, 598.

Mortgage by client to attorney for costs due and to become due, held, a valid security for the costs then due only.

Rolls.—April 30, May 2, Aug. 7, 1822; July 18, 1825.

BY indenture dated the 18th of February 1819, reciting that the defendant had employed the plaintiffs as her attornies in the defence of certain actions and indictments, and other business, and that a considerable sum was due from her to them, for managing and conducting the said defence and business, and that the management thereof would be attended with future expense, and that they had applied to her to give them some security for such past and future expenses if the same should not exceed 500*l.*, the defendant assigned and covenanted to surrender a copyhold estate to one of the plaintiffs, with a proviso for redemption in case of her paying on the 18th of February 1820, all such sums as should be due from her to the plaintiffs for or by reason of the conduct of the said defence and business, or in any wise relating thereto, or to any other matter, if the same should not exceed 500*l.*, or if the same should exceed 500*l.*, then upon payment of that sum.

The plaintiffs acted as attornies for the defendant for several months after the date of this deed. The bill prayed an account of the costs due to them, that the defendant might pay the amount, or that the mortgage might be foreclosed. The defendant in her answer alleged that the plaintiffs had mismanaged her business, and complained of their having declined to continue to act for her, while some of the matters in which they were employed were still pending.

Mr Horne and Mr Wilbraham, for the plaintiffs.

Mr Treslove, for the defendant.

A solicitor cannot take from his client a mortgage for securing future costs. It was decided in Jones *v.* Tripp, ante, p. 151, that such a security was void, and it was considered doubtful whether it could be made available even as to the costs incurred at the time of its execution. Securities given by the client to the solicitor, during the existence of that relation, have always been looked on with proper jealousy. Draper's Company *v.* Davis, 2 Atk. 295; Walmsley *v.* Booth, 2 Atk. 25; Saunderson *v.* Glass, 2 Atk. 296; Proof *v.* Hines, Cas. temp. Talb. 111. In the first of these cases the securities were ordered to be delivered up immediately. In Walmsley *v.* Booth, the bill was filed to set aside the bond, and it was allowed to stand as a security for what was really due, on the ground of the plaintiff having submitted to that. Here, however, the bill is filed to enforce the security; and the question is, whether a court of equity will lend its aid to carry such a deed into effect. If such deeds as these were permitted, they would continually be resorted to: the client would be placed at the mercy of the attorney, and the latter, secure at all events of recovering his costs, would be encouraged to lead the client into wanton litigation: it would be indifferent to him whether the client succeeded or not; and he

would have no inducement to exert due diligence. It appears also from the answer, that the plaintiffs deserted their client while her causes were pending: this conduct is a ground of objection to their claim. Cresswell *v.* Byron, 14 Ves. 271.

Mr Horne, in reply.

There is no general rule that an attorney may not take a security for future costs, limited to the amount that may be justly due. It does not prevent the taxation of his bill, or preclude the client from any other remedy. It does not give to the attorney any thing to which he would not be entitled without it; it merely secures the payment. The law gives the attorney a lien on the papers, and the fund recovered, both for past and future costs: in what respect is a lien arising from contract between the parties more mischievous, than that which arises by operation of law? It would be different if this were a deed securing to the attorney some exorbitant reward, or if it secured him the amount of his bill without taxation: but even in cases of that description, the court has not gone further than to cut down the amount to what should be found due upon taxation, allowing the deed to stand as a security *pro tanto*. Walmsley *v.* Booth; Saunderson *v.* Glass; Newman *v.* Payne, 2 Ves. Jun. 199.

Aug. 7.—The Master of the Rolls. I do not propose at present to go fully into the question which this case gives rise to, but only to put it into a train that may perhaps lead the parties to settle what is in difference between them. I shall direct an account of what was due from the defendant to the plaintiffs at the date of the security, in order to ascertain the sum which in any event they will be entitled to; for I apprehend it cannot be argued that a security may not be taken from a client for what is due from him at the time. The question has been whether a solicitor can *ab ante* take a security for future costs; and even the opinion which is strongest on the point, that of the Lord Chancellor, admits that it may be good for what was due at the time.

The object of the bill is to enforce a mortgage of a copyhold estate; and the security being admitted, and also the fact that there had been advances, and that there was a debt due at the time, the consequence follows that the plaintiffs are entitled to relief to that extent, unless there be any rule of the court prohibiting such a security between persons in the relative situations of solicitor and client. It is not pretended that there was any fraud: if there be any objection, it arises from the relation in which they stood. To the extent of protecting the client from any misconduct on the part of his solicitor, and of preventing any thing from being done which a disinterested solicitor would not advise, the practice of the court may reasonably go; but supposing that there is no fraud or imposition, and no doubt of the debt being due, or of the fairness of the transaction, if it is not attempted to preclude the taxation of the bill, to say that in such a case the security is void, appears to me to go beyond any principle or authority. If it were established that the security is bad as to the future costs, it would not follow that it must be also bad as to the other part; for it is not made void by statute. If the court considers it bad, it is only in the exercise of its discretion in regulating the conduct of solicitors; the court would, therefore, only invalidate it *pro tanto*, allowing it to stand as a security for the amount due at the time.

I do not, therefore, see any objection to giving the plaintiffs the benefit of the security, so far as I have mentioned, not deciding at present the

question whether they are entitled to any thing beyond it in respect of the subsequent costs. I cannot, however, conceal that the Lord Chancellor has intimated a strong opinion upon that point, considering that a security for future costs cannot be taken. Whatever my own opinion on that question may be, if I presumed to entertain a doubt on what he has expressed so strongly, I should not act upon it, as it would immediately be set right upon appeal. I hope I have sufficiently explained my view to enable the parties to see, how far it may be for their interest to meet, and whether they cannot, by agreement, fix upon a certain sum to be taken by the plaintiffs. Unfortunately for the defendant she has been involved in litigation to a great extent: it is not, however, imputable to the plaintiffs, for she was engaged in it before she became their client.

The decree directed the Master to take an account of all sums of money advanced by the plaintiffs to the defendant, and to tax the bills of fees and disbursements for business done by the plaintiffs for the defendant up to the 18th of February 1819; and also to tax the plaintiffs' costs of the suit; reserving the consideration of the question, whether the security given by the defendant to the plaintiffs was a valid security for their bill for business done subsequently to the 11th of February 1819.

Reg. Lib. B. 1821, fol. 1916.

July 18, 1825.—The Master having made his report, the cause was set down for further directions, and came on to be heard before lord Gifford, Master of the Rolls. His lordship in giving judgment referred to Pitcher *v.* Rigby, 9 Price, 79, where it was laid down by the lord chief baron that an attorney could not take a security for future bills of costs for business to be done, and on that authority, refused to decree an account of the costs subsequent to the date of the mortgage deed(*a*).

Reg. Lib. B. 1824, fol. 1774.

Barton *v.* Briscoe.

Jacob, 603.

Settlement in trust for the separate use of a married woman for life, but so as not to anticipate, with remainder as she should appoint by will; and in default of appointment, to A.

On the death of her husband, the restraint on anticipation ceases, and therefore she is entitled, with the concurrence of A., to a transfer of the fund.

Rolls.—August 5, 12, 1822.

BY indenture dated in August 1811, made upon the occasion of the sale of certain estates belonging to James Barton, in which Marian Barton his wife joined for the purpose of relinquishing her right of dower, two sums of 14,000*l.* and of 5833*l.* three per cent consols were paid and transferred to trustees, upon trust to lay out the same in the funds, or on real or government securities, with the consent of Marian Barton, signified by some writing signed by her, notwithstanding her coverture, and from time to

(*a*) See Pierson *v.* Hughes, 1 Freem. 71, 81; 3 Keb. 140, 153; Carter, 229.

time, with her consent, during her life to vary the securities, and upon trust to pay the dividends, interest and annual produce to such person or persons, and for such intents and purposes, as she should from time to time, notwithstanding her coverture, by any writing or writings signed by her with her name, in her own handwriting, appoint; but not so as to deprive herself of the intended use or benefit thereof by sale, mortgage, charge, or otherwise, in the way of anticipation; and for want of such direction, into her own proper hands for her own separate and peculiar use and benefit, independently and exclusively of the said James Barton, who was not to intermeddle therewith, nor was the same to be liable to his control, debts, or interference; and it was declared that her receipts for the dividends should, notwithstanding her coverture, be sufficient discharges; and after her death, upon trust to transfer the same to such person or persons, &c. as the said Marian Barton by her will or codicil signed by her, and attested by two witnesses, should appoint; and in default of such appointment, to transfer the same to Marian Millicent Barton, the only child of the said Marian Barton and her husband, for her own use and benefit.

James Barton had since died. Marian Millicent Barton had attained twenty-one. The bill was filed by her and her mother Marian Barton; stating that they had the absolute interest in the funds, and were desirous that the trusts of the indentures of August 1811 should be determined, and praying that the funds might be transferred into the sole name of Marian Barton.

Mr Shadwell and Mr Pemberton, for the plaintiffs, contended, that though the restraint on anticipation was valid with respect to the separate property of a married woman, Parkes *v.* White, 11 Ves. 209; Jackson *v.* Hobhouse, 2 Mer. 483, yet its effects could not extend beyond the coverture. The reasoning by which its validity is supported applies only to separate property, which being the creature of equity, courts of equity may set limits to the power over it. Upon the death of the husband the life-interest in this fund became the absolute property of the widow, and she must enjoy it with the usual incidents of property. Brandon *v.* Robinson, 18 Ves. 429, 1 Rose, 197; Graves *v.* Dolphin, 1 Simons, 66.

Mr Kindersley, for the trustees.

August 12.—The Master of the Rolls. The single point in this case is, whether upon the consent of the plaintiffs, the mother and daughter, a transfer of the fund comprised in the settlement can be made, the trustees requiring the sanction of the court before paying it over to purposes not strictly according to the letter of the deed. It may be urged against it, that there are words forbidding anticipation, directing that the mother shall not deprive herself of the use of the fund, and that she shall have during her whole life the power of disposing of it by will and not otherwise; and that to transfer it now would be directly contrary to these provisions. I have not been able to find any authority; and the question is, therefore, to be decided, whether a clause against anticipation, which is considered an obligatory and valid mode of preventing a married woman from depriving herself of the benefit of property settled (for it is too late to argue that now), becomes of no effect by the coverture being determined, and the parties interested consenting to a transfer.

In the case of a male, a similar attempt to restrain alienation would be

of no effect; that was decided in Brandon *v.* Robinson, where the words were nearly the same as here. The testator directed the interest to be paid to his son for life, and that he should not have power to anticipate the growing payments; but the Lord Chancellor was of opinion, that the son taking a life-interest, it followed as an incident, that he had an uncontrolled power of disposition over it, unless it was given over upon alienation, or upon an attempt to alienate. In this case there is no gift over, no other person having any interest; the equitable interest is absolute in the plaintiffs. It is not distinguishable from Brandon *v.* Robinson, except by the sex and coverture; and it cannot be said that the law will permit restraints upon the rights of property in the case of females, which it will not permit in the case of males. It is, however, to be considered, that this is a case of separate property; and that restraints may be imposed on the alienation of separate property is now settled, more upon authority than principle, beginning with what was done by lord Thurlow in the case of Miss Watson's settlement. At that time, however, there was considerable doubt about it; for if a *feme covert* is permitted to hold separate property in the same manner as if she were a *feme sole*, it would seem that it ought in equity to have those incidents which all other property has. It is difficult to conceive how they can be taken away from it, particularly when it is remembered, that the protection which courts of equity afford to married women with respect to their property not in settlement, they may if they please give up. Why, then, should a larger protection be extended as to that over which a power of disposition is given them? It is, however, too late to doubt the validity of these restraints: the question is, whether they must not be confined to the coverture. The power over separate property being a creature of equity, it is said that equity may modify that power; that reasoning, however, only applies during the coverture; when the married woman becomes discovert, she has the same power over her property as other persons: the restraint, therefore, ought not to continue. The attempt to impose upon the power of alienation a fetter unknown to the common law of England may be permitted to the extent to which that power is created by equity, but not further; when the coverture is gone, the reason on which the restraint is founded no longer exists.

Supposing that to be so generally, is it not pretty plain that it was in this case the intent of the parties so to confine the clause? The object was to exclude the power of the husband; her receipts are, therefore, to be discharges during the coverture: it is not to be liable to his debts; and it seems as if all the anxiety was to protect her from his control, which, by her having survived him, is now at an end.

Another point to be considered is with respect to the power the settlement gives to the mother of disposing of these funds by will. The question is, whether she can now deprive herself of it, and abdicate it. Now the case of Smith *v.* Death, 5 Mad. 371, and others of that kind, have decided that a power of this description may be parted with; and there is, therefore, I apprehend, nothing to prevent her from now releasing it, and thereby precluding herself from the exercise of it.

Cook *v.* Collingridge.

Jacob, 607.

Sale of a testator's share in a partnership trade, and the property belonging to it, by his executors, to his partners, for the purpose of being resold to one of his executors, set aside, and his estate held entitled to his aliquot proportion of the subsequent profits, as if the partnership had continued.

Interest allowed at 5*l.* per cent. on sums paid out to his estate.

Articles of partnership, providing that, upon its expiration, the stock in trade should be divided, received, and taken by the partners, according to their respective interests: Held, that they could not be carried into execution literally, and that, therefore, by the general law of partnership, the settlement must be by a sale and division of the whole.

June 4, 7, July 16, 1822; January 27, February 22, 1823.

IN the year 1803 William Cook, Thomas Collingridge, James Collingridge, Thomas Rowley, and George Mansell, entered into a partnership for seven years in the business of coachmakers. At the expiration of the term Thomas Collingridge retired from the business, receiving his share of the capital, and a sum of 2000*l.* for his share of the good will. The other four renewed the partnership for another term of seven years, from the 1st of January 1811 to the 1st of January 1818, and articles of agreement for this second partnership were drawn up, dated in September 1812.

By these articles, after reciting the proportions of the partnership property belonging to the different partners, it was agreed that James Collingridge should be entitled to two-fifths of the stock and profits, and Cook, Rowley, and Mansell, to one-fifth each. Collingridge was to draw out of the trade quarterly the sum of 350*l.* for his maintenance, and the other three 175*l.* each.

It was provided that at the end, expiration, or other sooner determination of the copartnership, the accounts and concerns of the trade should be settled, and after payment or making provision for payment of all rents and arrears of rents, and all other debts owing from the partnership, and making all just allowances and deductions, all the joint stock, property, leases, and effects whatsoever, and all debts, moneys, bonds, bills, notes, and other securities belonging or owing to them, should be divided, received, and taken by the partners respectively, and their respective executors and administrators, rateably and in proportion to their respective rights and interests therein. In case any one or more of the partners should happen to die during the continuance of the partnership, it was provided that the surviving partners or partner should carry on the partnership trade for the then remainder of the term of seven years, for the joint benefit of themselves and the personal representatives of the deceased partner or partners, in the same proportions, and in like manner, as if such deceased partner or partners had continued living; and all debts, sums of money, cash, bonds, bills, notes, and other securities for money, claims, and demands whatsoever, then owing or belonging to the partnership, were to be collected and got in by the surviving partners with all convenient speed, consistent with the interest of the partnership trade, and all proper steps and remedies were to be taken by them for that purpose; and when got in, they were, in the first place, to be applied in paying and

discharging all debts owing by the partnership, and after payment thereof, and after retaining so much as should be necessary for carrying on the partnership trade, the residue was from time to time to be accounted for by the surviving partners, and divided amongst them and the executors or administrators of the deceased partner, rateably and in proportion to their respective shares and interests, reserving only so much thereof as should be necessary for well and effectually carrying on the trade. If the debts owing and belonging to the partnership should be insufficient to discharge the demands upon it, the deficiency was to be made up by the surviving partners and the executors or administrators of the deceased partner, rateably and in proportion to their respective shares. It was also provided, that if all the partners should happen to die during the continuance of the term, then, upon the decease of the last, the like course, order, and manner of proceeding should be observed with respect to the accounts and concerns as was agreed upon in case of the partnership determining by effluxion of time.

W. Cook died in August 1813, having by his will directed his executors, during the continuance of the copartnership term of seven years, to receive his quarterly allowance of 175*l.*, which they were to divide amongst his wife and his two sons, William Cook, junior, and the plaintiff John Cook, in certain proportions. He directed his executors to purchase 10,000*l.* three per cent consols, and to pay the dividends of it to his wife for her life,—the principal, after her death, to sink into the residue of his estate. He gave the residue to his executors, upon trust, by any ways and means they in their discretion should think fit, to convert it into money, and to pay one-third of it to his son William Cook, another third part to his son John Cook, and out of the other third part he directed that C. L. Gray, the husband of his daughter Maria Gray, should receive 500*l.*, and that the remainder of it should be invested upon trusts for the separate use of his daughter for her life, and upon her death to be divided amongst her children. He appointed his son William Cook, his partner James Collingridge, and Samuel Collingridge, to be his executors.

After the death of Cook the business was carried on by the surviving partners, upon the footing of the partnership articles, until the expiration of the term of seven years, in January 1818. Sometime before that period disputes arose between the surviving partners and William Cook the younger on one side, and John Cook on the other. The partners had determined to take William Cook into the concern, but refused to accede to the wishes of John Cook to become a member of the firm. In consequence of these disagreements, he, in January 1817, gave a notice to the executors of his father William Cook deceased, requiring them at the expiration of the seven year's term to sell all the partnership stock in trade and effects, as the only means of producing the full value. Some negotiations took place afterwards, but no agreement was come to.

Soon after the expiration of the term the executors of W. Cook determined to sell his share of the partnership property at a valuation. They named one appraiser for the purpose of making the valuation, and another was named by Mansell and Rowley. The two persons thus appointed valued the stock in trade at 24,146*l.* 18*s.*, and the leasehold premises belonging to the trade at 9106*l.*; the good will was not valued, but it was agreed that it should be estimated at 11,000*l.* On the 17th of March 1818 Samuel Collingridge, one of the executors, wrote to the plaintiff John Cook, inclosing the above valuation, and stating that it was the intention of the

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executors to sell the testator's interest in the stock in trade and good will to the surviving partners for the sum of 8850*l.* 11*s.* 7*d*, being a fifth of the valuation. To this letter no answer was returned.

The sale determined upon was afterwards carried into effect by indenture dated the 27th of May 1818, made between James Collingridge, Samuel Collingridge, and William Cook the younger, as executors of W. Cook deceased, of the one part, and the said James Collingridge and Mansell and Rowley, the surviving partners, on the other part, by which the former assigned the testator's share of the partnership property to the latter, in consideration of 8850*l.* 11*s.* 7*d.* By another deed, bearing date on the 29th of May, one fifth part of the partnership property was assigned to William Cook the younger, in consideration of the same sum, which was paid by him, and he was then admitted into the partnership with James Collingridge, Mansell and Rowley.

John Cook was apprized by letter of the sale to the surviving partners having been effected. In March 1819, he filed the bill in this cause against James and Samuel Collingridge, William Cook, Mansell and Rowley; C. L. Gray and his wife, and their two infant children, were also made defendants, as being entitled to one third of the residue of the testator's estate. The bill alleged that the sale of the testator's interest in the partnership property was collusively managed, and that the full value was not obtained: it prayed that the sale might be set aside, that there might be a resale, and an account of the profits of the trade. It also contained some charges as to the circumstances under which the testator's will was made, and complained that hopes of being admitted into the partnership had been held out to the plaintiff: but no relief was prayed on these points.

The defendants, the executors and partners, by their answers, insisted that the sale was fair and *bonâ fide;* that the full value had been obtained, and that a more beneficial mode of disposing of the testator's share of the partnership property could not have been adopted. They admitted the profits of the trade since 1818 to have been considerable, amounting to more than 10,000*l.* per annum. The defendants, the Grays, by their answer, said they believed the property was fairly sold to the surviving partners at a proper valuation, and that the sale was advantageous, and they had therefore declined to join in the suit. Witnesses were examined on the part of the defendants to prove the mode in which the valuation was made: they stated that the full value was set upon the property, and that in any other mode of selling it, so large a price could not have been obtained. The testator's legacies had been paid, and several sums had been also paid by the executors to the plaintiff on account of his share of the residue.

The cause was heard in November 1821, before the Vice-Chancellor, who was of opinion that the residuary legatees of the testator were entitled to set aside the sale, and to have a fifth part of the profits of the trade from January 1818: but as the children of C. L. Gray and his wife, who were interested in the residue, being infants, were not competent to elect, a decree was made, which, after directing the usual accounts of the testator's estate, referred it to the Master to inquire whether it would be most beneficial to the testator's estate to confirm the sale of his interest in the partnership concern made by the executors, or to have it considered that the partnership business had, since the 1st of January 1818, been carried on, as to one-fifth share, on account of his estate, and that his residuary

legatees were entitled to insist upon a sale of the whole partnership stock and effects, in order to ascertain the utmost value of his share.

The defendants, the executors and partners, appealed from the part of the decree which directed this inquiry, and moved to stay the proceedings pending the appeal.

The Attorney-General, Mr Heald, Mr Shadwell, Mr Roupell, Mr Rose and Mr Koe, for the different defendants, in support of the appeal.

The question turns upon the proper mode of disposing of the testator's interest in the partnership property. The plaintiff by his notice to the executors required that the whole of the stock in trade should be sold, and the produce divided among the partners and the testator's estate, and he insists that a sale of the whole ought now to be directed. But the articles of partnership do not contemplate a sale at the dissolution of it: they provide that the leases and stock shall be divided between the partners and their representatives, which precludes the idea of a general sale. The executors were, therefore, obliged either to have a division of the stock according to these articles, or to sell the testator's interest; and in preferring the latter they were making the most advantageous exercise of the extensive discretion vested in them by the testator. The valuation is shown to have been ample, and in no other way could a larger price have been procured. A considerable sum was allowed for the good will, which in strictness the testator's estate was not entitled to; for in the absence of any provision to the contrary, the good will survived to the other partners.

The executors notified their intention to the plaintiff before the sale was completed, and as he expressed no dissatisfaction, they were justified in presuming that he was content with the arrangement. If he had then dissented, they might have suspended the prosecution of it, and have agreed with him upon some other mode of sale. It was not, however, till a long time after the conveyances had been executed that he complained of the transaction, and he ought therefore to be considered as having waived any objection to it, by his silence and acquiescence. His discontent arises only from the defendants' declining to admit him into the partnership.

But even if the sale could be set aside, the testator's estate will not be entitled to any share of the profits made since the expiration of the term, his capital engaged in it having been paid out. The principle upon which accounts of profits made in trade have been directed in former cases has been, that the parties carrying on the trade have, in breach of their duty, employed in it and endangered the property of others. That was the principle of Crawshay *v.* Collins, 15 Ves. 226, 1 Jac. & Walk. 267; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, and Heathcote *v.* Hulme, 1 Jac. & Walk. 122; and the share of the profits given was in proportion to the amount of capital employed. In Burden *v.* Burden, cited 1 Jac. & Walk. p. 134, also, which was much relied on in the argument before the Vice-Chancellor, the property of the testator was retained in the trade by his brother and executor, and, therefore, he was decreed to account for the profits. This case is distinguished from those, by the circumstance of the testator's capital not having been retained. Besides this, the profits are chiefly owing to the skill and exertions of the defendants and to their connections, to the benefit of which other persons can have no claim.

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Mr R. Grant, for the defendants, the Grays.

Mr Hart and Mr Romilly, for the plaintiff, insisted on the principle by which a trustee or executor is disqualified from dealing with the trust property for his own benefit. The transaction in this case, though sought to be disguised, was in effect a sale to W. Cook, one of the executors. It was previously arranged that he was to be the purchaser, and appraisers appointed between him and his executors and partners. Even if the valuation was fair, we cannot be bound by it under such circumstances; and he must be considered as a trustee in respect of this purchase, and, consequently, account for the profits made by it. In Burden *v.* Burden the testator's partner and executor took his share of the trade and partnership property at a valuation: the sale was set aside, and he was decreed to account for the profits, and pay one moiety to the testator's estate.

The meaning of the articles must have been, that at the end of the term there should be a sale of the stock, and that the produce should be shared between the partners, that being the only practicable mode of division. It could not be intended that the specific articles of property should be divided. The defendants ought, therefore, to have sold the whole, as required by the plaintiff: they could not compel him to acquiesce in any other mode of adjusting the account, and not having followed the proper course, it follows, on the same principle as in Featherstonhaugh *v.* Fenwick, that the partnership must be considered as not having been dissolved, but as still subsisting on the former terms. It is now to be wound up by a sale and an account of the profits.

The plaintiff, before the transaction of the sale, had given to the executors a notice, calling upon them to sell the property openly. Upon their afterwards informing him that their intentions were different, he was not bound to repeat his desires, of which they were already in possession, and which they had resolved not to comply with. He did not consent; and his not again expressing his dissent cannot be deemed a waiver of his right, which it was their duty to have attended to spontaneously.

Jan. 27, 1823.—The Lord Chancellor. This is an appeal from a part of the decree made in this cause by the Vice-Chancellor, by which he has directed the Master to inquire whether it will be most for the benefit of the parties interested in the testator's estate, to confirm the sale of his interest in the partnership property which has been made, or to have it considered that the business which has been carried on as to one-fifth part on account of his estate, and the gravamen of the appeal is, that this reference implies, that if it is found most beneficial not to confirm the sale, a decree is to be made for an account of one-fifth of the profits, and that some mode is to be adopted for a new sale.

In making this reference, the Vice-Chancellor was guided by the consideration that the plaintiff John Cook was the only party complaining of the sale, he being interested in the question together with other persons; and it seems to have been his opinion, that if it should be found to be more beneficial to all the parties interested not to disturb what had been done, he ought not to allow the plaintiff alone to disturb it on any notion of his liking something else better; intending to confirm it or not, according to what might be most beneficial for the parties, and not to set it aside only because the plaintiff desired it. He appears to have collected from the answer of the Grays that they were satisfied with what had been done, though it does not seem so to me, unless they stated *ore tenus* at the bar

that they were so. For their answer does not prove that they knew what it was that had been done; they appear to have considered the transaction as a sale to the surviving partners, not as, what it appears to me that it really was, a sale to William Cook, one of the executors.

The case depends upon the will of the testator, and upon articles of partnership not very capable of being literally carried into execution. The articles, dated in 1812, begin in the usual manner with stating their agreement to become partners, and their shares of the capital, and then follow clauses providing for what was to be done upon the determination of the partnership, or upon the death of any of the partners. They first put the case of its ending by the expiration of the term of seven years, or other sooner determination: in that event the property of every description belonging to the business was to be divided, received, and taken by them respectively according to their respective interests. Now the property of the partnership consisted of leasehold premises, of materials necessary for the manufacture, and other stock in trade, and of what would be still more difficult to deal with according to these articles, a number of agreements with customers to provide them with carriages for certain periods at specified rates. It is difficult to conceive what was to be done according to the articles with these engagements, unless they happpened to end at the expiration of the seven years. This, however, was the agreement on which the partnership was formed. Another case is then put, of the death of one or more of the partners during the term of seven years; the trade was then to be carried on till the end of the term, and in the meantime the outstanding debts to be collected and divided with as much expedition as could be, reserving enough to carry on the trade. This again would not be very easy to manage, as it would be very likely to be a matter of dispute how much would be necessary for that purpose. Another case is then put, that of the death of all the partners within the term; and then it was provided that the same course should be pursued to assign the proportion of each as in the case of a determination by effluxion of time.

It happened that William Cook died in 1813, having previously made his will. There is a good deal introduced into the pleadings and evidence, with the view of showing that his sons John Cook and William Cook were intended to be partners. But I pass that over, it not being within the authority of the court to declare what might have been fit to have been done as to taking them into the business, and the fact was, that neither of them was a partner, and neither of them had a right to become one. The case must be looked at only with reference to the articles, and to the will, and to the acts of the parties.

The will notices the articles of partnership, and directs the quarterly payments which the testator was entitled to during the continuance of the trade, to be paid to his wife and sons. He gives the residue of his property to his executors, upon trust to convert it into money by any ways and means which they should think fit. On this clause we may observe, that each of them is invested with the character of trustee as well as with that of executor, and a large discretion is given to them as to the mode of sale, as large as this court can permit to be given, having regard to the rules which the court has established with respect to trustees selling to themselves: but this is certainly not a discretion authorizing them to do that which the rules of equity will not allow.

Then, how has this discretion been dealt with? I should be sorry to be understood to impute any wrong motive to any one, for I believe they

all meant well. Their intention appears to have been that W. Cook should become a partner, and, in a sense, he was a partner from January 1818, though the deeds were not executed till May. They were aware that the sale could not be made to W. Cook, that the executor could not sell to the executor; the form in which it was done was, that the executors sell to the surviving partners, and they sell to W. Cook; and I confess that, according to my notion of the rule of the court, if it were clear that, according to the articles of partnership, the stock was to be valued and sold at a valuation, it would be difficult even then to say that the sale could stand, if in truth, whatever were the form, it was a sale by one executor, who was a partner, to another executor, who was also a selling party, and who was about to become a partner; for it was fully understood that he was to be a partner.

The manner in which they go to work is this: on the one side there was James Collingridge, who was both a partner and an executor: Samuel Collingridge, an executor; and W. Cook, an executor, and about to become a partner. On the other side were the then partners. Two persons are appointed to make a valuation of the leases, materials and other stock. On the 27th of May the testator's share is assigned to the surviving partners, as if for themselves, and on the 29th of May it is assigned to William Cook, reciting that they had agreed to take him into partnership. There was only one intermediate day. It is impossible not to see that this was all one transaction, and that, on the part of James Collingridge and W. Cook, it was that species of transaction which the law will not permit; I mean that the law will not permit parties invested with a trust to deal with it so as to benefit themselves, and this principle, as far as it goes, will affect third persons who lend themselves to such a transaction.

This view makes it not very material what is the meaning of the articles. It might be the meaning literally that the leases, stock, and engagements were to be divided, and that the partners were to take a share of each article. The Vice-Chancellor thought the division was to be by means of a sale. Being myself of opinion that it is impossible to act upon the articles taken literally, the general law of partnership must be applied, which appears to me to be properly laid down in Featherstonhaugh *v.* Fenwick, 17 Ves. 298. To the doctrine there laid down by sir W. Grant as to the adjusting the affairs of a partnership, on its dissolution, I entirely accede.

I cannot say that this was such a sale as should have been made. And the valuation was such that it would be difficult for any one to say that it was proper; for they valued the property, putting a distinct value upon each article. But the question was, not what each individual article was worth, but what was the value of the whole, every part being valued in connexion with every other. And it does not rest there, for if W. Cook, the executor, was to be the buyer, he ought to have consulted his *cestui que* trusts as to who should be the valuers, and as to the principle on which the valuation should be made.

One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand. Therefore, it being admitted that it will be more beneficial to the persons interested in the testator's estate that the partnership should be considered as not hav-

ing been terminated, I think they are entitled to have it so considered. They will be entitled to an account of the profits, and to have the stock sold. With respect to the mode of sale, it would be very desirable that the parties should agree upon it: but if they cannot, I do not know any way of managing, except by referring it to the Master to inquire what will be the most beneficial manner of disposing of it.

Feb. 22.—The cause was mentioned again on a motion on the part of the defendants to vary the minutes. They contended that an allowance should be made to William Cook for his services in the business; and that the testator's estate was not entitled to one-fifth of the profits made since January 1818, but only to a share proportionate to the amount of his capital engaged, as in Crawshay *v.* Collins; and that the sums from time to time paid out from the trade to the testator's family, ought to be considered as reducing his share of the capital involved, and consequently, as reducing his share of the profits. They also desired that the Master might make a separate report as to the mode in which the property was to be sold.

The Lord Chancellor. In giving my judgment I took pains to state my opinion that there was no blame attaching on any of the parties, for I believe they all meant well, and I do not know that what is now desired will ultimately prove most advantageous to the persons concerned. The ground of my decision was, that there was a sale by the executors to one of themselves, and that the other persons who were parties to the transaction were effected by the same rule of policy. I was bound to say that it could not stand. If I could myself determine the most beneficial mode of sale, I should be glad to do it; but it is impossible for me to settle that, as I do not sufficiently understand the subject. But certainly there should be no delay about it: therefore let the Master make a separate report upon the mode of sale, and let him proceed *de die in diem.*

With respect to the allowance claimed by W. Cook for his services, I happened to have to consider that in Crawshay *v.* Collins, and Brown *v.* De Tastet. And with respect to that decision of Crawshay *v.* Collins, I am sure that if it be true, as it has been said, that it has frightened any one, it frightened me most when I found what it was supposed to have decided: it did not decide one quarter of what has been supposed. In Brown *v.* De Tastet, ante, 133, the Vice-Chancellor thought that the shares of profits paid to the acting partners ought to be considered as their wages. I altered that, because I thought that it ought to be left open to the Master to consider what it would be proper to allow, and if any thing could be claimed for their services, it might be claimed before the Master. I have never said that the persons by whose labour and trouble the business is carried on, were not to have a reasonable allowance for it. Here, taking the partnership not to have determined, which is the principle of the decree, we must consider it to have been carried on in the same manner as before, and therefore William Cook, or any other person, may claim whatever is reasonable. But I will add a direction, which I think was added in Brown *v.* De Tastet, for the Master to state his reasons for allowing or disallowing what may be claimed.

There is more difficulty, I confess, as to the other point; but my strong opinion is, that this is not similar to Crawshay *v.* Collins, or Brown *v.* De Tastet, for it is not merely a case of excluding a partner, but of a sale of

a partner's share set aside ; and it is difficult to say that advances of money made from the trade are to be considered as payments of his capital, when they were made not in that character, but as payments of part of the purchase money. But it seems to me to be reasonable that interest should be allowed upon those advances at 5*l.* per cent.

His lordship doth declare, that the sale of the said testator's interest in the copartnership concern in the pleadings mentioned is void. And his lordship doth also declare that the interest of the executors of the said testator W. Cook in the said copartnership concern is not yet terminated. And his lordship doth order that it be referred to Mr H., one, &c., to inquire what is the most beneficial mode for all parties of disposing of the partnership property and effects. And the said master is to state the same, with his opinion thereon, to the court, and is to be at liberty to proceed *de die in diem* upon the said inquiry, and is to make a separate report thereof, with liberty to state such special circumstances as to him shall appear material, and thereupon such further order shall be made as shall be just. And it is ordered, that the said master do take an account of the profits of the said trade from the last settlement of accounts which the said master shall find to have been made by the said testator, or his executors, since his death. And it is ordered that the said master do take an account of all such sums of money as have been taken out of the said trade, and all such sums of money as have been paid to the executors of the said William Cook for or in respect of the said testator's interest in the said partnership business and property, by any of the parties, and state when and by whom the same have been so taken out. And it is ordered that the said master do take an account of all sum or sums of money which shall have been advanced or paid to the executors of the said W. Cook for or in respect of the alleged purchase of the said testator's interest in the said trade in the pleadings mentioned, and calculate interest at the rate of 5*l.* per cent per annum upon such sum or sums as he shall find to have been so advanced and paid. And his lordship doth reserve the consideration of the allowance of such interest until the account of the profits shall have been taken. And for the better taking the said accounts, and discovery of the matters aforesaid, the parties are to be examined on interrogatories, and to produce before the said master, upon oath, all deeds, papers and writings in their custody or power relating thereto as the said master shall direct, who in taking the said accounts is to make unto the parties all just allowances : and as to such of the said allowances as are claimed and objected to before the said master, he is to state his reasons on allowing or disallowing the same. Further directions and costs reserved, and liberty to apply.

Reg. Lib. A. 1822, fol. 729.

Osmond *v.* Tindall.

Jacob, 625.

Interrogatories and depositions not to be referred on motion of course before the hearing for impertinence alone, without scandal.

April 22, 30, June 20, July 27, 1822; May 29, 1823.

THIS was a petition by John Whittle and several other defendants, for the discharge of an order of the 12th of March 1822, by which it was referred to the Master to certify whether the state of facts carried in by them under the decree, was impertinent to the subject matter of the inquiry; and whether the interrogatories exhibited, and depositions taken in support of it, were leading or impertinent; the order had been made as of course, upon the petition of the defendant Ann Holmes.

It appeared that the state of facts in question was carried in on the 15th of November 1820, together with interrogatories for the examination of two of the parties in support of it; these interrogatories being objected to as impertinent, the Master disallowed them, and substituted others in their place. Other interrogatories were exhibited for the examination of witnesses, in support of the state of facts; the depositions were delivered out on the 9th of March. It appeared that warrants had been taken out on the part of the defendant Ann Holmes, on the 13th of November 1821, and the 28th of February and the 8th of March 1822, which were underwritten, for the defendants Whittle and others to substantiate their state of facts, or that the same would be disallowed. The solicitor for the defendant Ann Holmes stated that he had objected before the Master to the state of facts, and the interrogatories for the examination of the parties, on which the Master allowed his objections to the interrogatories, saying that the proper time for objecting to the state of facts would be when it was proceeded upon.

Mr Agar and Mr Moore, in support of the petition.
Mr Horne and Mr Beames, against it.

The Master of the Rolls, in giving judgment, referred to a collection of MS. cases compiled by a gentleman who had for many years been secretary at the Rolls, in which the practice was stated to be, that interrogatories might be referred on petition of course for being leading; and that interrogatories and depositions might in like manner be referred either for scandal or impertinence. His honour mentioned several instances of such orders: Irish *v.* Rooke, 27th April 1727; Cash *v.* Dupree, 22d December 1740; Phillips *v.* Meredith, 3 Feb. 1742; Lycett *v.* Leach, 7th June 1748; Jones *v.* Jones, 29th July 1742; Baker *v.* Mayor of Rochester, 9th December, 1749; Bray *v.* Bulkby, 3d July 1756, 1 Dick. 288; Nicholas *v.* Wilder, 15th February 1763; and noticed Cocks *v.* Worthington, 2 Atk. 235; Horsey *v.* Horsey, 2 Atk. 235; Pyncent *v.* Pyncent, 3 Atk. 557; and Erskine *v.* Garthshore, 18 Ves. 114. Upon these authorities he thought that the order in question was one which, according to the practice, might be obtained by a petition of

course, but that in this instance the defendant Ann Holmes, by taking out warrants to proceed on the state of facts, had waived any objection to it, and could not afterwards refer it. His honour, therefore, discharged the order of the 12th of March, so far as it related to the state of facts.

June 20, *July* 27.—A motion was now made before the Lord Chancellor, to discharge so much of the order of the 12th of March 1822, as related to the interrogatories and depositions. In addition to the authorities mentioned above, the case of White *v.* Fussell, 19 Ves. 113, was cited, in which it was held that interrogatories and depositions were not to be referred for impertinence only, without scandal(*a*).

The Lord Chancellor. This case is of great importance. It is the duty of the court to take care that its records are as clear of scandal and impertinence as possible. Where an answer is referred, there is but little difficulty, because it is not necessary to look at any thing but the bill and answer; it is not so with depositions. I certainly thought, the last time the question was before me, that lord Hardwicke took a very wise course in postponing the decision till the hearing of the cause(*b*). If it be a motion of course, that the Master shall look into all the pleadings and the interrogatories and depositions, and say whether the interrogatories or depositions are impertinent, we should be running the risk of expunging a great deal which the court might think material at the hearing. If the question, whether the matter is impertinent, be brought before the court before the hearing, the court, I think, can hardly do justice without hearing the cause and knowing the whole case.

There is another difficulty here; because the Master of the Rolls thought that the party could not refer the state of facts, having taken a step after it was brought in. If you take a step, you cannot afterwards move to refer for impertinence, on the principle that by taking a step on the state of facts, you admit the pertinence of it. If that be so, I do not see how an interrogatory asking questions as to matters which the state of facts alleges, can be said to be impertinent, if the state of facts be not so.

It seems to me, that if interrogatories and depositions are to be referred for impertinence, it is absolutely necessary, that before deciding that question, the whole cause should be understood from beginning to end. It was on this ground, I think, that Lord Hardwicke went, in leaving the question of impertinence till the hearing, though he would strike out scandal, as that affects character; but impertinence only affects the purse, and the court may afterwards set that right.

May 29, 1823.—The Lord Chancellor said, he was of opinion that the interrogatories, if they were not more extensive than the state of facts, could not be objected to; and that interrogatories and depositions could not be referred for impertinence on motion of course before the hearing. His lordship, therefore, discharged the order, with liberty to make any motion on the subject at the hearing.

Reg. Lib. B. 1822, fol. 1160.

(*a*) This case was not noticed in the argument before the Master of the Rolls.

(*b*) Pyncent *v.* Pyncent, 3 Atk. 557.

Brookfield *v.* Bradley.

Jacob, 632.

An estate descending to an infant heir, subject to a lien or equitable charge: Held, that the parol does not demur in a suit instituted by other creditors.

Infants being added as parties to a cause after the report had been made, it was referred to the Master to inquire, whether it would be for their benefit that the report should be adopted as to them.

An estate descended to an infant heir cannot be sold at the suit of creditors, on the ground that, from the circumstances of the property, a sale will be beneficial to the infant.

An estate descending to an infant heir, subject to a trust to sell for payment of certain incumbrances: Held, that it could not be resorted to for the payment of other specialty debts during the minority of the heir.

June 19, July 24, August 8, 1822.

THIS was a bill by a creditor of William Law, a deceased trader, on behalf of himself and the other creditors, for the payment of their debts out of his real and personal estate: the defendants were his executors and devisees, and his heir at law, who was an infant. The original decree, made in December 1816, directed accounts of his debts and personal estate, and inquiries as to his real estate. The Master having made his report, the cause came on to be heard for further directions on the 5th of March 1822, when an objection was taken that the children of two of the testator's brothers, who under his will took a contingent interest in his real estate, had not been made parties: the cause in consequence stood over, and a supplemental bill was filed to bring them before the court. Several of the defendants to the supplemental bill were infants; the cause now came on again.

Mr Hart, for the plaintiffs, observed, that the defendants to the supplemental bill were not in strictness bound by the report in the original suit, as having been made in their absence, but that they could derive no advantage from the accounts being taken over again, and those of them who were adult were therefore willing to abide by the former proceedings; and he suggested that if the court were satisfied by a reference to the Master that it would be for the benefit of the infants, it might also be adopted and confirmed as to them: a similar reference had been made by Sir W. Grant in Pennington v. Lord Muncaster.

The Vice-Chancellor said, he thought that would be the proper course; and upon the consent of the adult defendants to the supplemental bill, to be bound by the former proceedings, he referred it to the Master to inquire whether it would be for the benefit of the infant defendants that the report should be adopted as to them, and they were to be at liberty to take objections to it before the Master.

July 24.—The Master having reported that it would be for the benefit of the infants to adopt the report, the cause was set down again; and the question was, whether the parol ought to demur as to some of the testator's

estates, which having been acquired subsequently to the date of his will, had descended to his infant heir : part of these estates were subject to equitable charges.

Mr Bell contended, that as to the estates covered by the charges, the parol did not demur ; for that the persons entitled to the charges might file a bill, and, as against them, the parol would not demur, and an immediate sale would be decreed ; and although they were not parties to this suit, yet the same decree might be made here, as it was indifferent to the heir in what suit the sale took place, and the effect of refusing it would only be to render another bill necessary. He cited Mould *v.* Williamson, 2 Cox, 386, where, upon this principle, it was held, on a bill by specialty creditors, that the parol did not demur, on the ground that the estate was charged with legacies, which the legatees were entitled to have raised immediately.

The Vice-Chancellor concurred in this reasoning, but the nature and extent of the charges not appearing sufficiently upon the pleadings, he directed a reference to ascertain whether the descended estates, or any part of them, were subject to any and what lien, charge, or contract.

August 8.—By the report it appeared that part of the descended estates had been subjected by the testator to an equitable mortgage by deposit of the title deeds ; another part had become the property of the testator, under the effect of agreements with some persons to whom it had, with other property, been devised as tenants in common with him : it had not yet been conveyed to him in severalty, and was subject to a lien for a sum due from him to them under the agreements.

The Vice-Chancellor was of opinion that these parts of the estates might be sold as being subject to equitable charges.

With respect to another part of the descended estates, it appeared that it had been held by the testator and his partner J. Law, under a lease for sixty-three years from October 1783. In October 1801 they made a mortgage of this lease, which had not been paid off, and was still subsisting. In June 1811 they purchased the freehold and inheritance, which was conveyed to them, subject to the lease of October 1783. Afterwards, upon a dissolution of partnership in the year 1813, the interest of J. Law was conveyed and assigned to the testator.

Mr Bell argued that as to this estate the term must be sold as being personal property, but that it would be disadvantageous to all parties to have it sold separately from the reversion, which had descended upon the heir, and that it ought to be referred to the Master to inquire whether it would be for his benefit that the reversion should also be sold, as had been done in cases of bills of foreclosure against an infant heir(*a*).

The Vice-Chancellor said, that the testator's interest in the lease must be sold, but that he could not refer it to the Master to inquire whether it would be for the benefit of the infant heir that the inheritance

(*a*) See Mondey *v.* Mondey, 1 V. & B. 223.

of this estate should be sold, unless some authority for it could be found. The case of a mortgaged estate was an exception ; there it was only to prevent a foreclosure(*a*).

Mr Hart and Mr Duckworth, for the plaintiff.

Mr Bell, Mr Wetherell, Mr Horne, Mr Shadwell, Mr Roupell, Mr Garrait, Mr Stephen, Mr Purvis and Mr Jacob, for the different defendants.

The decree was in part as follows: "In case the said testator's per-

(*a*) On the doctrine, as to the parol demurring in equity, see Lechmere *v.* Brasier, 2 Jac. & Walk. 287, and the cases cited in the note, p. 290.

The following statement of the case of Scarth *v.* Cotton (reported Cas. temp. Talb. 198), is taken from the Register's Book, B. 1735, fol. 518 :

The plaintiff was a bond-creditor of J. White, who died intestate, leaving Margaret, his only daughter, an infant, his heiress at law. White was entitled to some real estates, subject to a mortgage for 6460*l.* The defendants, Cotton and Woodcroft, having lent him certain notes which he had negotiated, and the amount of which he had received, he, to indemnify them, executed deeds of lease and release, dated in Aug. 1729, by which, after reciting the mortgage, he conveyed the estates to them (Cotton and Woodcroft), upon trust, by sale or mortgage, to raise money to pay off the mortgage and discharge the notes and their costs and charges, and then to stand seised to such uses as he should direct, and in default of such direction, to the use of him, his heirs and assigns.

After the death of White, Cotton and Woodcroft filed a bill to be satisfied their demand ; and a decree was made in Feb. 1731, for an account of what was due upon the mortgage, which Cotton and Woodcroft were to pay, or their bill to stand dismissed as against the mortgagee. The Master was to inquire what Cotton and Woodcroft had *bonâ fide* paid for White on account of the notes, and to which he was liable, and also what they stood engaged to pay for him on account of the notes, and to compute interest on what they had paid ; and it was ordered, that so much of the estates as should be sufficient to pay what Cotton and Woodcroft should pay to the mortgagees, and what the Master should certify to be due to them for what they had paid for White, and to indemnify them for what they stood engaged to pay, should be sold ; and the money arising by the sale to be paid to Cotton and Woodcroft in discharge of what they had paid and should pay ; the costs were to be paid out of the money arising from the sale.

The bill in this cause, after stating as above, and that the personal estate was insufficient for payment of the plaintiff's debt, complained that the decree had not been prosecuted, and prayed that the plaintiff might have the benefit of it, in order to be satisfied his debt, with interest and costs. The defendant, Cotton, in his answer, said he had carried in his charge, and was proceeding under the decree ; the mortgagees said, they were willing to assign on being paid ; the infant insisted, that the estates should not be sold during her infancy.

By the decree, it was referred to the same Master to inquire what was due to the plaintiff, and to tax him the costs of the suit, and to take an account of the personal estate of the intestate, and the plaintiff's debt was to be paid out of it in a course of administration ; and if the personal estate should be insufficient to pay what should be reported due to him, then the plaintiff was to be at liberty to carry on the accounts directed by the former decree, in case the plaintiffs (in the former suit) should neglect to carry on the same ; and in case, after satisfaction of what should be found due to the plaintiffs or to the defendants in that cause according to the said decree, any part of the money arising by the sale directed by the said decree should remain, or any part of the estate should remain unsold, then liberty was reserved for the plaintiff in this cause to resort to the court touching a satisfaction to be made to him for what should be found due to him, after the infant should attain her age of twenty-one years. The plaintiff was to pay the costs of all the defendants, except the infant and the administratrix, and they were to be added to his principal and interest, and repaid with the same.

sonal estate shall be insufficient for payment of his debts and funeral expenses, the court doth declare that his real estates descended are in the first place liable to make good the deficiency ; and in case the same are insufficient, then his real estates which passed by his will ; but the parol is to demur during the minority of the defendant, the infant, the heir at law of the testator, as to the descended estates comprised in the fourth schedule, and the same are not to be sold during his minority : but this is to be without prejudice to any question between the heir at law, when of age, and the devisees, as to the devisees being recompensed what, if any thing, shall be raised out of the devised estates for payment of the said testator's debts, under the directions hereinafter given."

Reg. Lib. A. 1821, fol. 2345.

Brandling *v.* Humble.

Jacob, 48.

SUMS below 10*l.* payable out of court to a number of persons, paid to their solicitor, to save the expense of powers of attorney.

Rolls.—March 15, April 2, 1821.

Pierce *v.* Thomas.

Jacob, 54.

WRIT of *certiorari* to the court of great sessions in Wales quashed, it having issued without a special ground laid for it, and directing the tenor of the record, instead of the record itself, to be returned.

April 3, 1821.

Ex parte Martin.

Jacob, 55.

ON petition under the statute 56 Geo. 3. c. 60, for a re-transfer of unclaimed stock that has been transferred to the sinking fund, the costs are in general to be paid out of the stock in question.

Rolls.—April 10, 1821.

Browne *v.* Barnard.

Jacob, 57.

THE six clerks are not responsible for the correctness of the office copies. Their signature is affixed as a certificate that the original is filed.

Rolls.—April 10, 1821.

Daws *v.* Benn.

Jacob, 95.

IN a suit by an impropriate rector for tithes, when the defence is that the tithe in question is vicarial, and the vicar who is a defendant dies during the suit, it is not necessary to make the new vicar a party, if the plaintiff will waive the account subsequent to his induction.

The tithe of tare seed held to be a small tithe.

An usage of rendering one article of small tithe to the rector, will not support his title against the vicar, if it appears to have originated from a mistaken notion that the article in question was a great tithe.

Rolls.—May 13, 15, 1821.

Yates *v.* Hardy.

Jacob, 223.

EXCEPTIONS to an answer must be signed by counsel.

Exceptions not signed by counsel, taken off the file, though the defendant had taken an office copy of them, and the plaintiff had obtained an order of reference.

Aug. 15, 1821.

Ex parte Verney.

Jacob, 234.

THE statute 39 and 40 Geo. 3. (lord Eldon's act), does not apply to money paid into court in the matter of a lunatic.

August 17, 1821.

Ex parte Ellice.

Jacob, 234.

THE property of a lunatic only to be invested in government securities, except under peculiar circumstances.

August 17, 1821.

Ex parte Shaw(*a*).

Jacob, 270.

WHETHER the proceedings under a commission of bankrupt that has been superseded are subject to the solicitor's lien. *Quære.*

After a commission of bankrupt has been superseded, the great seal has power over the proceedings for the purpose of safe custody, and sometimes orders them to be deposited in the bankrupt office.

A party ordered to produce papers, which are in the hands of his solicitor, must pay his bill of costs, if he cannot otherwise procure them.

August 30, 31, 1821.

The Attorney General *v.* Wray.

Jacob, 307.

A VICAR and vestrymen having, under an act of parliament, a power of leasing lands belonging to the vicarage for any number of years, at the best rents, a lease for 999 years will not be set aside on the principles applicable to leases by trustees of charities.

March 14, 15, 1820; Nov. 5, 1821.

Busk *v.* Lewis.

Jacob, 363.

A MODUS of one penny, payable by every occupier of land in lieu of the tithe of hay: Held, bad.

A modus of a shilling for a milch cow in lieu of the tithe of milk: Held, rank.

Rolls.—Dec. 6, 7, 1821.

(*a*) 1 Glyn & Jameson, 123.

M'Dermot *v.* Kealy.

Jacob, 374.

ORDER, empowering the Master from time to time to receive proposals for leases, and to report on them.
Dec. 10, 1821.

Heathcote *v.* Edwards.

Jacob, 504.

A FUND carried to a separate account paid out on motion by consent, the title to it being clear. 13 Ves. 394.
May 4, 1822.

Trotter *v.* Trotter.

Jacob, 533.

WHERE an attachment issues against a defendant in custody in the king's bench prison, it is to be lodged with the marshal, and an *habeas corpus* may then be moved for before the return of the attachment.
June 20, 1822.

ENGLISH

CASES IN CHANCERY.

BEFORE LORD LYNDHURST, LORD CHANCELLOR; AND SIR JOHN LEACH, MASTER OF THE ROLLS.

Tarleton *v.* Dyer. Barnes *v.* Wilson.

Russell and Mylne, 1.

A SECOND order to amend, obtained by petition of course, is irregular, though obtained before answer.

The acceptance of the 20*s*. costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order to amend, obtained as of course.

June 16, 25, July 31, 1829.

Between James Worthington Livesey and Mary Carter Livesey, and Harding Livesey, infants, by James Worthington Livesey, their brother and next friend, plaintiffs; and Martin Livesey and Jane his wife, John Armstrong, Eliza Livesey, Edmund Worthington Livesey, and others, defendants.

Russell and Mylne, 10.

By the direction of A., a bill was filed for the administration of a testator's assets, in which A. and his infant brother and sister, by A. as their next friend, were plaintiffs; D., their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents: after the

[Livesey *v.* Livesey.]

sister had attained her full age, D. died, having appointed her his executrix: A. gave notice to the persons who had been the town agents of D., not to take any proceedings in his name, and the sister appointed them to act as solicitors for her: Held, that A. was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them.

The sister filed a bill of revivor after the death of D., and made A. and his infant brother defendants: A. and the brother, after notice of that bill, filed another bill of revivor: this second bill was ordered to be taken off the file; and the court held, that an alleged defect of parties in the frame of the first bill of revivor afforded no reason for allowing the second bill of revivor to remain on the file.

November 3, 1829.

THE suit was instituted in 1822, for the administration of the assets of Dr Worthington, the grandfather of the plaintiffs(*a*). Their elder brother, the defendant Edmund W. Livesey, a solicitor at Liverpool, had a considerable interest under the grandfather's will, adverse to theirs; and Ellis and Co., his agents in London, had conducted the suit on his part and that of the plaintiffs. Mary Carter Livesey, one of the infant plaintiffs, attained her full age in July 1825. In May 1827, E. W. Livesey died; and the adverse interest, which had been in him, became vested in Mary Carter Livesey, as his executrix and residuary legatee. Shortly afterwards, James Worthington Livesey, who was the sole adult plaintiff at the institution of the suit, gave notice to Ellis and Co. not to take any proceedings in his name; and, at the same time, Mary Carter Livesey retained them as her solicitors.

On the motion of James Worthington Livesey, the Vice-Chancellor had made an order that Ellis and Co. should deliver up the papers to him on the payment of what, on taxation, should be found due to them in respect of the costs of the suit.

Mary Carter Livesey now moved that the order might be discharged.

It appeared by the affidavit of James Worthington Livesey, that, originally, he had given authority to his brother E. W. Livesey, as his solicitor, to institute the suit, and conduct it. But, in the course of the proceedings, Ellis and Co. communicated immediately with James Worthington Livesey, and received instructions and directions from him personally. They alleged, that, on those occasions, they considered him as the agent of his brother Edmund.

The Solicitor-General and Mr J. Russell, contra.

Mr Bickersteth, in reply.

The Lord Chancellor. I consider E. W. Livesey as having been in point of fact the solicitor of the plaintiffs; and the propriety of his appointment does not come into question for the purposes of this motion. Whatever impropriety there might be in the appointment, it was the act of James Worthington Livesey. Ellis and Co. were the agents of E. W. Livesey: and these papers came into their possession as his agents. They are, therefore, held by them for the benefit of all the clients; and one or two of the plaintiffs are not entitled to demand the delivery of them, without the concurrence of the third. Let the order of the Vice-Chancellor be discharged.

A similar order for the delivery of papers had been made by the Vice-

(*a*) Livesey *v.* Livesey, 3 Russell, 287.

Chancellor in a cause for the administration of the grandmother's estate, in which there was another adult plaintiff, who supported the application of James Worthington Livesey ; so that a greater proportion of the whole interest, represented by all the plaintiffs, was there opposed to Mary Carter Livesey, than in the suit relating to the grandfather's property. The Lord Chancellor discharged that order likewise.

The will of E. W. Livesey, being contested in the ecclesiastical court, was not proved till June 1828 ; and shortly afterwards, Mary Carter Livesey filed a bill of revivor. The defendants to it were her two brothers, who had previously been co-plaintiffs with her, and all the persons who had been defendants to the original bill, except John Armstrong, the surviving trustee under the testator's will. The original decree directed an account against him ; but the bill of revivor alleged that he was dead, and had not possessed himself of any part of the trust property. On the 29th of July, James Worthington Livesey appeared to this bill ; and, on the 6th of August, he and his infant brother, after a previous application to Mary Carter Livesey not to proceed in reviving a suit which she had no right to prosecute, and which they meant to carry on with due diligence, filed a bill of revivor, stating that she had acquired an interest adverse to theirs, and neither would nor could any longer concur with them as co-plaintiffs. The defendants to this bill were Mary Carter Livesey, such of the parties defendants to the original bill as were living, and the real and personal representatives of Armstrong.

On the 26th of August, Mary Carter Livesey obtained an order of revivor on her bill ; and, on the following day, her two brothers obtained an order to revive in their suit.

With the motion relating to the custody of the papers, there was combined an application on the part of Mary Carter Livesey, that the bill of revivor filed by James Worthington Livesey and Harding Livesey might be taken off the file for irregularity, and that the order of revivor obtained by them might be discharged.

In support of the application it was said, that Mary Carter Livesey had obtained priority of suit, and that James Worthington Livesey and his infant brother, having appeared to her bill, and having notice of her proceedings, were not entitled to file another bill of revivor, which was altogether unnecessary.

On the other side it was contended, that though, after a decree, any party had a right to revive, yet a defendant could not make herself plaintiff in a bill of revivor, and convert the original plaintiffs into defendants, unless those plaintiffs omitted or refused to revive the suit with due diligence; and, in like manner, one of the several plaintiffs had no right to convert the co-plaintiffs into defendants, unless they refused to be themselves active in remedying the abatement(*a*). Mary Carter Livesey, as one of the several co-plaintiffs, was guilty of irregularity in taking upon herself to file a bill of revivor ; the irregularity was the greater, because she was originally an infant co-plaintiff, having no share in the conduct of the suit, and incurring no liability in respect of it ; and if it were said that, as she had acquired an interest adverse to her brothers, she could no longer be a co-plaintiff with them, the answer was that the acquisition of the interest

(*a*) "It was likewise held, that, if some of the plaintiffs refused to join in bringing a bill of revivor, the others may bring such bill, and make those who refused defendants." 1 Eq. Abr. 2.

of a deceased defendant must be considered as placing her in the situation of that defendant, so as to exclude her from the right of reviving the suit, until the other plaintiffs were chargeable with negligence and delay. But even if she had the same right to file a bill of revivor as her brothers, her bill was defective; and the court would not order a proper bill of revivor to be taken off the file, because another party had chosen to file an improper bill. The decree had directed accounts against Armstrong, which had not been taken; and he was the surviving trustee, the legal interest in the trust-property had become vested in his representatives. His real and personal representatives were, therefore, necessary parties to the suit; and, under the order of revivor obtained by Mary Carter Livesey, the decree could not be prosecuted with effect. She alleged, indeed, in her bill of revivor, that Armstrong did not possess himself of any part of the trust-property: but the original decree, directing an account, showed that that allegation could not be true, unless the decree were erroneous; and the mere allegation of Mary Carter Livesey could not deprive the other parties of their right to an account, which the decree had directed. Even if such an allegation were to destroy the right to an account, it could not cure the defect arising from the want of any representative of the surviving trustee. Such imperfections in the frame of Mary Carter Livesey's suit were a sufficient ground for refusing the motion, or at least for a reference to the Master to inquire, which suit of revivor ought to be permitted to go on.

It was stated in reply, that the rule, which prohibited one of the plaintiffs from alone filing a bill of revivor, unless his co-plaintiffs refused to concur with him, did not apply to the present case; because it was clear from the previous conduct of the parties, as well as from the nature of the interest which Mary Carter Livesey acquired on the death of Edmund, that she and her brothers could not continue co-plaintiffs. As to the alleged imperfection of her bill of revivor, the court could not enter into the consideration of that topic. If that bill were defective, the defect could be cured by amendment.

The Lord Chancellor held, that Mary Carter Livesey's bill having been first filed, James Worthington Livesey had no right to file another bill of revivor; and that the court would not inquire, in this stage of the proceedings, whether the first bill was or was not defective; for any defect in it might be cured hereafter.

The order to take the bill of revivor off the file, and to discharge the order of revivor, was made without costs.

Gibbs *v.* Phillipson.

Russell and Mylne, 19.

A person who is served with a subpœna ad testificandum in London, and is at the time resident there, is not protected from arrest in the interval between the service of the subpœna and the day appointed for his examination.

A witness who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London *bonâ fide* for the purpose of giving evidence. *Semble.*

A witness is not protected in going, three days before the day appointed by the examiner for his examination, to the solicitor's office to look at the interrogatories, with a view to prepare himself to give his evidence accurately.

Nov. 4, 1829.

THIS was the petition of the plaintiffs and of James Randolph, described as of the city of Bath, praying that Randolph might be discharged out of custody.

It stated, that, on the 12th of September, a subpœna to testify had been served on Randolph in London; that Randolph, being informed that, in consequence of the state of business in the examiner's office, his attendance would not be required till after the 6th of October, went into Cambridgeshire, but on the 5th of October returned to London for the express purpose of obeying the subpœna; that, finally, the 22d of October was fixed for his examination, and he was served with a notice to that effect under the hand of the examiner; that on the 19th of October, Randolph, being then in London for the express purpose of giving evidence in obedience to the subpœna, was arrested under a warrant granted by the sheriff on a writ of capias ad satisfaciendum, while he was on his way to the office of the plaintiff's solicitor, "for the purpose of looking into the draft of the interrogatories exhibited for his examination, in order to prepare himself to speak with certainty as to the matters required to be elicited."

There was an affidavit to the same effect(*a*).

The solicitor of the creditor, at whose suit the arrest had taken place, swore, that Randolph, to avoid his creditors, quitted Bath in 1827; that, since the commencement of 1829, he had frequently seen him in London; that he believed that Randolph had been resident in London since 1827, and that the allegations, that he had come to London and remained there for the purpose of obeying the subpœna and giving evidence, were delusive.

The Solicitor-General, for the petition.

The subpœna in chancery does not fix the day on which the witness is to attend to be examined; but when once a day is appointed, he is informed of it by a note under the hand of the examiner, and he is bound to attend on that day. Randolph was arrested not only after he had been served with the subpœna, but after he had received the note of the examiner, fixing the 22d of October, and while he was on his way to do an act preparatory to his examination. He is entitled to be discharged, both

(*a*) Randolph had applied to lord Tenterden to be discharged; but his lordship refused the application.

because his arrest was within the time to which his protection would extend, and because it took place while he was engaged in an act connected with his obedience to the subpœna.

Mr Pepys, contrà.

The Lord Chancellor. In September, Randolph was served with a subpœna in London, where, I must assume, his residence at that time was. Being afterwards informed that his examination would not take place for some time, he went into Cambridgeshire; and thence he returned to London—not to a strange place, but to the place where he had been served with the subpœna; and, finally, he was informed that his examination would take place on the 22d of October. Under these circumstances, he could not be protected, on the 19th, by the subpœna and the notice for his examination on the 22d.

He next says, that he ought to be protected, because, when he was arrested, he was on his way to the solicitor's office for the purpose of looking at the draft of the interrogatories. It has never been decided that a witness is entitled to protection under such circumstances: and, on the same principle on which this application proceeds, a person might claim protection, while going to the solicitor of one of the parties to an action, in order to be examined, preparatory to his giving evidence in a court of law. There is no case which would justify me in saying, that a person is protected in going to the solicitor's office to look at the interrogatories, as preparatory to his examination as a witness.

Had Randolph come from the country for the purpose of being examined, he would have been protected during the whole time of his remaining here *bonâ fide* for the purpose of giving his testimony.

The petition was dismissed with costs.

Fernes *v.* Hutchinson.

Russell and Mylne, 22.

If a defendant, who is in a situation to dismiss a bill by an order of course for want of prosecution, after replication filed, does not avail himself of his right, but permits the plaintiff to file interrogatories and examine witnesses, he cannot afterwards dismiss the bill for want of prosecution; and an order of dismissal, subsequently obtained, will be discharged for irregularity.

November 4, December 9, 1829.

THE plaintiff, without having been served with notice of a motion to dismiss the bill for want of prosecution, filed a replication to the answer of the defendant, and served a subpœna to rejoin on the 6th of May: so that, according to the seventeenth order, he ought to have given rules to produce witnesses, and ought to have passed publication, in Trinity term following; and, upon his default in so doing, the defendant was at liberty to have dismissed his bill with costs. Trinity term ended on the 8th of July; and nothing was done by either plaintiff or defendant till the 14th of July, when the plaintiff filed interrogatories in the examiner's office. On the 22d of that month, he proceeded to examine two witnesses, after

[Fernes *v.* Hutchinson.]

the usual notice to the clerk in court of the defendant; and he was proceeding to examine other witnesses, when the defendant presented a petition of course at the rolls, stating that the plaintiff had filed a replication, and served a subpœna to rejoin, returnable on the 6th of May, and that no proceedings had been since taken. On that petition the usual order was made, that the bill should stand dismissed with costs.

The plaintiff now moved to discharge the order for irregularity.

The Solicitor-General, for the motion, referred to the anonymous case, 14 Ves. 492.

Mr Horne, contrà.

December 9.—The Lord Chancellor. Under the seventeenth order, the plaintiff was bound to give rules to produce witnesses and pass publication in Trinity term. The term ended on the 8th of July; witnesses had not then been produced, nor had publication passed; and the defendant was therefore entitled to have dismissed the bill with costs, by an order of course. The defendant, however, did nothing. On the 14th of July, the plaintiff filed his interrogatories in the examiner's office: on the 22d of July, he examined two witnesses, after the usual notice to the defendant's clerk in court; and he was proceeding to examine his third witness, when, on the 24th of July, the defendant obtained the usual order, dismissing the bill for want of prosecution, with costs. The question is, was he entitled to obtain this order?

I am of opinion, that, under these circumstances, the defendant was not entitled to obtain an order of dismissal. He was entitled to have dismissed the bill at the end of the term, and within a convenient time afterwards: he did not avail himself of this right; and the plaintiff might fairly consider that he did not mean to dismiss the bill. The plaintiff then takes a step, of which he gives notice to the defendant, and is allowed to go on. The defendant having lain by during the whole of this time, and having had distinct notice that the plaintiff was proceeding in the suit, was not entitled afterwards to dismiss the bill by a common order.

The order was discharged with costs.

In the matter of several Parishes of Llantrisant, &c.

Russell and Mylne, 25.

The sixtieth of the new orders extends to the production of books and papers under orders or decrees made before the date of the new orders.

The Master is to exercise the discretion given him by the sixtieth order, to determine what books or papers shall be produced, though the order or decree, under which he is proceeding, requires the parties to produce, on oath, *all* books and papers.

November 7, 28, 1829.

THE petition related to the administration of a charity. By an order of the Master of the Rolls, dated the 5th of November 1827, various accounts and inquiries were directed, with the usual clause requiring the

[In the matter of several Parishes of Llantrisant, &c.]

ties to produce before the Master upon oath all deeds, books, papers and writings in their custody or power, relating to the charity.

Under this order the feoffees of the charity lands carried in two states of facts; and, in proceeding on these states of facts, such of the deeds, books, maps and surveys, as were then considered necessary, or were required by the other party, were from time to time produced. Afterwards the petitioners obtained a warrant, requiring the feoffees to bring into the Master's office all deeds, maps, papers and writings relating to the charity estates. The feoffees submitted to the Master, that many of the maps and deeds were mere evidences of title to the charity lands, and could be of no use in prosecuting the inquiries and accounts directed by the order; and they contended, that, according to the sixtieth of the new orders(*a*), he ought to exercise his discretion in determining what books, papers, or writings should be produced. The Master refused to exercise such a discretion, and on the 4th of December granted his certificate, and they "had not brought in before him upon oath the several deeds, books, papers and writings, in their custody or power relating to the charity, although they had been duly summoned so to do." Upon this certificate the usual four-day order was obtained.

The feoffees moved before the Lord Chancellor, that the order of the 4th of December might be discharged, or that it might be referred to the Master to inquire and certify what deeds, maps, books, papers and writings were proper or necessary to be produced before him for the purposes of the order of the 5th of November 1827, and when and how long a time they were to be left in his office; and that, in the mean time, the proceedings under the order of the 4th of December 1828 might be stayed.

Mr Cockerell, in support of the motion.
Mr Wyatt, contrà.

November 28.—The Lord Chancellor. By the original order, made in November 1827, the parties were required to produce before the Master all deeds, books, papers and writings connected with the charity, which was the subject of the petition. In November 1828, the Master issued his warrant, requiring the trustees of the charity to bring into his office all deeds and papers relating to the charity estates. The parties afterwards attended before him, when it was urged on behalf of the trustees, that the Master should exercise his discretion according to the sixtieth of the new orders, in determining what books and papers should be produced before him, and how long they should be left in his office. The Master was of opinion that he could exercise no discretion on the subject, and that he could only certify that the warrant had not been complied with. On the 4th of December 1828, he granted his certificate of default; and, on the same day, the usual order was obtained from the court.

I have seen the Master. It seems to have been his opinion, that, as the

(*a*) "That, where, by any decree or order of the court, books, papers, or writings are directed to be produced before the Master for the purposes of such decree or order, it shall be in the discretion of the Master to determine what books, papers, or writings are to be produced, and when, and for how long they are to be left in his office; or in case he shall not deem it necessary that such books, papers, or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient."

[In the matter of several Parishes of Llantrisant, &c.]

original order, requiring the production of the papers, bore date before the issuing of the new orders, it was doubtful whether the sixtieth order was applicable to such a case; and further, as the original order pronounced by the Master of the Rolls, directed that *all* papers should be produced on oath, he doubted whether he had any discretion to decide that some of them should not be produced.

My opinion is, that the sixtieth order applies to decrees and orders made before, as well as to those made after, the date of the new orders; and I do not think that there is any necessity for altering the usual language of decrees and orders, which extends to all books, papers and writings: but that, the terms of the particular decree or order being general and most comprehensive, the Master is, nevertheless, to exercise the discretion given him by the sixtieth order.

The order of the 4th of December must, therefore, be suspended: and it must be referred to the Master to determine what books and papers are to be produced, and how long they are to remain in his office.

Wagstaff *v.* Bryan.

Russell and Mylne, 28.

Statements in an answer are impertinent, if they are neither called for by the bill nor material to the defence, with reference to the order or decree which may be made on the bill.

Statements in an answer to a bill of revivor, which merely show irregularity and miscarriage in the former proceedings in the suit, are impertinent.

Form of exceptions for impertinence under the new orders.

An exception for impertinence fails, if any part of the passage included in it be not impertinent.

Rolls.—Nov. 9, 1829.

THE bill in this case was merely a bill of revivor, though some of the allegations, introducing matter which was only matter of revivor, were stated by way of supplement. In the answer, a detailed account of the proceedings which had taken place in the suit, and which were referred to in the bill, was introduced, for the purpose of objecting to them as irregular and oppressive: and it was insisted that some of the orders, which had been made in the cause, ought to be set aside, and that money, which had been paid out of court under them, ought to be brought back. One continuous portion of this statement extended to upwards of ninety folios. On a reference for impertinence, the Master had reported that the answer was not impertinent; and to his report the plaintiff took exceptions.

Mr G. Richards, in support of the exceptions, contended, that long and prolix statements of the former proceedings in an answer to a bill of revivor, were altogether irrelevant. If the defendant wished to complain of the former proceedings, he ought to have preferred his complaint by a motion or petition.

Mr Kindersley, contrà, contended, that the party had a right to place on the record his protest against the course of procedure which the plaintiff had adopted; and more especially, as he would have a right to read his answer on the question of costs.

[Wagstaff v. Bryan.]

The Master of the Rolls. The question is, whether long statements, introduced for the purpose of showing that there has been irregularity and misconduct in the proceedings of the plaintiff, are impertinent, because the defendant can have no advantage of them with reference to the order of revivor, which is the only order that can be made on this bill. In my opinion, it would lead to great oppression, if a defendant were at liberty to introduce into his answer matter of which he can have no advantage, with reference to the proceeding which he is called on to answer.

It is said, that, on the question of costs, the defendant might have the benefit of this answer; as he would then have a right to have it read, and these statements would show the injustice and irregularity of the plaintiff's conduct. But the court, if, in considering the question of costs, these statements were pressed on its attention, would say, that it is not in this mode that proceedings in a suit ought to be complained of; that, if proceedings are irregular or oppressive, parties must take the proper course to remove the irregularity or remedy the oppression; and that a judge will not suppose that proceedings have been irregular or oppressive, if the proper course to complain of them has not been taken.

The principle on which I proceed is, that nothing ought to remain in the answer, except that which is called for by the bill, or would be material to the defence, with reference to the order or decree which may be made on the bill. This answer, therefore, is impertinent, in so far as it brings forward a case, which can have no effect upon the order of revivor.

Another answer to the same bill had been referred for impertinence on the same ground, after the new orders had come into operation; and, pursuant to the sixth of those orders, exceptions had been filed, describing the particular passages which were considered to be impertinent. Each exception included a great portion of the answer, and described that portion as extending from a specified word in a specified folio, to another specified word in another specified folio.

Mr Kindersley objected that the exceptions were bad in form. Each allegation, he said, ought to have been the subject of a separate exception, as each interrogatory must be made the subject of a separate exception, where the answer is complained of for insufficiency; and each exception ought to have stated the matter complained of as impertinent.

The Master of the Rolls held, that the exceptions were right in point of form. The only object of the sixth order was, to inform the defendant what particular parts of the answer were complained of as impertinent, and that information was given him with sufficient certainty by this mode of excepting.

The greater part of the matter included in each exception was impertinent, according to the principle laid down by the Master of the Rolls in deciding on the answer, which had been the subject of the first reference: but, with respect to the answer which had been referred under the new orders, Mr Kindersley submitted, that the plaintiff was bound to make out that the whole of the passage contained in each exception was impertinent, and that, if any part of it, however short, could be shown to be not impertinent, the whole of that exception must fail.

[Wagstaff v. Bryan.]

Mr G. Richards, on the other hand, contended, that, if part of the matter included in one exception was impertinent and part of it not impertinent, the court would allow the exception as to so much of the matter as was impertinent, and disallow it as to the rest. Such had hitherto been the usual course of the Masters in proceedings on exceptions for impertinence; and it was analogous to the mode of proceeding on exceptions for insufficiency. A different rule would force a party to make each separate allegation the subject of a separate exception, which would occasion great prolixity and expense.

The MASTER of the ROLLS held, that each exception must be supported *in toto*, or must fail altogether; that the exception must be overruled, if it included any one passage which was not impertinent: and that the sixth order might be completely evaded, if a different rule were adopted; because a party would then be left at liberty to file sweeping general exceptions, and take the chance of succeeding on some small portion of a vast mass of matter.

The defendant succeeded in showing that each exception included some passage which was not impertinent; and the exceptions were disallowed.

Bingham *v.* Woodgate.

Russell and Mylne, 32.

WHERE a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir.

Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord.

Rolls.—Nov. 10, 17, 1829.

Miles *v.* Langley.

Russell and Mylne, 39.

Where the possession is vacant, a purchaser is not bound to inquire of the late occupier, what was the nature of his title.

Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold, part of B.'s estate; A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale, as "into the occupation of A." Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation.

Rolls.—Nov. 19, 1829.

[Miles *v.* Langley.]

TRENCHARD was owner of the Abbots Leigh estate, which consisted partly of certain lands called Woodclose. An adjoining messuage and certain other lands, of which one acre and a half constituted part of a close called Cullhays, were holden by Ames Hellicar under the college of Winchester, by a lease for twenty-one years, renewable by custom at the end of every seven years. The portion of Cullhays comprised in Hellicar's lease, being at some distance from the other lands demised by the college, had been in the occupation of Trenchard: and, in 1798, he and Hellicar entered into an agreement to exchange a part of Woodclose, which was immediately adjoining to the college lands, for Hellicar's part of Cullhays; the exchange being to continue so long as the parties, or those claiming under them, were entitled to the respective properties.

In 1810, the plaintiff Miles became the purchaser of the Abbots Leigh estate. The lands, acquired under the agreement of 1798, were comprised in the conveyance to him: and he had been, ever since 1810, in the occupation of them, and had enclosed them in his park.

Ames Hellicar renewed his lease from time to time; and by his will, dated in 1811, devised the leasehold to his son Thomas Hellicar. He died; and Thomas Hellicar entered into possession of that part of Woodclose which had been given in exchange for part of Cullhays, and of all the premises comprised in the lease, except that part of Cullhays.

In 1819, Thomas Hellicar became bankrupt; and his assignees put up the leasehold to sale by public auction. In the particulars of sale, the premises were described as a dwelling-house with lawn, and about four acres of land attached(*a*), two hot-houses, &c., "late the residence of Thomas Hellicar;" and the tenure was stated to be leasehold under the college, at a quit-rent of 7*l.* a year. Langley became the purchaser. At the time of the purchase, he had no actual notice of the agreement of exchange between Trenchard and Ames Hellicar; and he entered into possession of the exchanged part of Woodclose, considering it to be land comprised in the lease from the college. That lease he renewed, and assigned it to his sisters the defendants; who, being afterwards informed of the agreement of exchange entered into in 1798, refused to ratify it, and brought an ejectment to recover that part of Cullhays comprised in the college lease, which, ever since 1798, had been in the possession of the owners of Abbots Leigh.

The present bill was filed for an injunction, and to have the agreement of exchange specifically performed.

The first question was, whether Langley, having the legal estate in that part of Cullhays which he sought to recover, was bound by the agreement of exchange between Trenchard and the elder Hellicar. That question depended upon another, namely, whether Langley, although he had no express notice of the agreement, had not implied notice, inasmuch as, at the time of his purchase, the plaintiff was, under that agreement, in possession of the exchanged part of Cullhays, which was comprised in the college lease.

Sir Charles Wetherell and Mr Wilbraham, for the plaintiff, referred to Daniels *v.* Davison, 16 Ves. 249.

(*a*) This, it was suggested at the bar, was the description of the premises in the college lease; the lease, as stated in the bill, purported to demise a "messuage, orchard, garden, stables, and five acres of land, with the appurtenances."

[Miles v. Langley.]

Mr Tinney and Mr Benson, contra.

The MASTER of the ROLLS. In this case the first question is, whether the Langleys having the legal estate in that part of Cullhays, which they have sought to recover, are bound by the agreement of exchange between Trenchard and Ames Hellicar. And it has been argued for the plaintiff, that, although Langley had no express notice of the agreement, yet he had implied notice; because the plaintiff, at the time of Langley's purchase, was in possession of the exchanged part of Cullhays, which was comprised in the college lease, and therefore, upon the principle of the case of Daniels *v.* Davison, decided by lord Eldon, Langley must be taken to have known the title under which the plaintiff held the exchanged land.

In Daniels *v.* Davison lord Eldon held, that a purchaser was bound to inquire of the occupier of the land which he was about to purchase, what was the title under which he occupied, and was therefore to be considered as having implied notice of the nature of that title. That principle has no application here; Langley being totally ignorant of the fact, that the plaintiff occupied any land comprised in the lease which he purchased, the exchanged land of Woodelose making up the quantity described in the college lease. If it be said that Langley ought to have inquired of the bankrupt Thomas Hellicar, what was the nature of the title under which he occupied Woodelose; the answer is, that the bankrupt was not then in the occupation of Woodelose, although he had been so before his bankruptcy; and lord Eldon's principle in Daniels *v.* Davison cannot, where the possession is vacant, be extended to the last occupier.

My opinion, therefore, is, that, as Langley had no notice, either express or implied, of the equitable agreement under which the plaintiff claims, the defendants have a right to avail themselves of their legal title: and the bill must be dismissed with costs.

Cockle *v.* Whiting.

Russell and Mylne, 43.

IF a bill be dismissed at the hearing with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious, that the bill could not have been filed *bonâ fide* in expectation of a favourable decree—or if the solicitor of the plaintiff guarantee his client against the costs of the suit—the court, upon the petition of the defendant, will compel the solicitor of the plaintiff to pay the taxed costs. *Semble.*

Rolls.—November 20, 1829.

Fereday *v.* Wightwick.

Russell and Mylne, 45.

Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern.

Where an annuity is granted for a term of years, to be paid half yearly, and, at the same time, promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase-money with interest, exceeding the rate of 5*l.* per cent, the transaction is usurious.

Rolls.—November 19, 23, 1829.

IN this case, six persons, having taken a lease for years of certain mines, and also another lease of the surface lands under which the mines were situated, worked these mines and occupied the surface lands, as a joint and partnership concern, dividing the same among them in equal shares. One of these six persons, Turton by name, assigned his shares by way of security for money advanced, and then became bankrupt. He had been manager of the concern, and was greatly indebted to it at the time of his bankruptcy.

The present bill was filed by such of the original partners as continued to be interested in the concern, and by other persons who either were the representatives of deceased original partners, or claimed as purchasers of shares. The prayer was, that the partnership property might be sold, and the partnership accounts taken, and that it might be declared that the shares of the partner who had become bankrupt, ought, in the first place, to be applied in repaying to the partnership the debt which he had incurred in the management of the concern.

The principal question in the cause was, whether the plaintiffs were entitled to the relief last stated: the defendants, who claimed under the bankrupt partner, insisting, that the common principles of partnership were not applicable to the case of mines, which were of the nature of real property.

Mr Bickersteth and Mr Rolfe, for the plaintiffs.

As the mines have been worked, and the surface has been used at the common expense of all the partners, and for their common profit, the lease must be considered as acquired for the purposes of a partnership concern. Such an interest in mines as exists here, is considered, not as a joint interest in lands, but as a partnership in trade: Story *v.* Lord Windsor, 2 Atk. 630; Crawshay *v.* Maule, 1 Swanst. 495; Jefferys *v.* Smith, 3 Russell, 158, 1 Jac. & Walk. 298. In the latter case, lord Eldon, 1 Jac. & Walk. 302, adopts and sanctions the observation of lord Hardwicke, "that a colliery is to be considered in the nature of a trade, and where persons have a different interest in it, it is to be regarded as a partnership." In Crawshay *v.* Maule, 1 Swanst. 518, lord Eldon, speaking of leases of coal mines and iron works, says, "it seems difficult to establish that this is an interest in land, distinct from a partnership in trade—a mere interest in land, in

[Fereday *v.* Wightwick.]

which a partition could take place; for when persons, having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund to be sold for their common benefit, it may be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership trade:" and the order made in that case amounted to a decision, that the lessees were, as to the working of the mines, partners in trade.

The consequence is, that these leases, being in the nature of general partnership property, must be sold, now that the partnership is dissolved; and, as each partner's portion of the proceeds of the sale must be first applied in discharging any debt which may be due from him to the company, the incumbrancers of Turton's shares, and Turton's assignees, will not be entitled to any thing, till the whole debt is satisfied which Turton has incurred to the concern.

Mr Lovat, for defendants, in the same interest with the plaintiffs.

Mr Tinney, for the assignees of Turton.

Mr Pemberton and Mr Wilson, for incumbrancers of Turton's shares, contrà.

Crawshay *v.* Maule was not a case in which tenants in common of certain mines concurred in working them and selling the produce. 1 Swanst. 524, 525. In that concern, large quantities of iron were manufactured, sometimes from the materials obtained from the premises which were in lease to the partners, and sometimes from materials purchased elsewhere. The proprietors were in the habit of making very considerable purchases of iron-ore, pig iron, finers' metal, old wrought iron, and naval and ordnance stores, for the purpose of manufacturing these materials into various sorts of iron, and re-selling them in a manufactured state: it was expressly stated that these purchases were made with a view to profit by manufacturing the articles so bought into iron for resale, and not merely for the purpose of improving by mixture the iron of the works, or bringing it in a better state to market: and, from the first establishment of the works, the iron, stone, coal, and limestone, produced from the mines in lease, had never been sold in their natural state, except a small quantity of coal. Under such circumstances, it was impossible to say that there was not a partnership trade: but if the parties had merely concurred in working mines demised to them as tenants in common, lord Eldon would have applied a different rule of decision. 1 Swanst. 522, 525. "With respect," said he, "to mere joint interests in land, I apprehend the rule to be different: the parties then becoming tenants in common, each cannot call on his companions to concur in a sale, but must sell his own interest. It is said that this is only the case of a tenantcy in common of a mine: if so, I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships." In Jefferys *v.* Smith, the order for the appointment of a receiver proceeded, not on the notion that the court was dealing with a trading partnership, but on the principle, that, "where there are part-owners of a mine, and they cannot by contract agree to appoint a manager, this court will manage it for them." 1 Jac. & Walk. 302. "Here," says lord Eldon, 1 Jac. & Walk. 303, "there are twenty shares; and if each owner may employ a manager and set of workmen, you destroy the subject altogether: it renders it impossible to carry it on. It appears to me, therefore, upon general principles, without reference to the particular circumstances of any case, that, where persons are concerned in such an interest in lands as a mining concern is, this

court will appoint a receiver, although they are tenants in common of it." There is no case which carries the doctrine further than Crawshay v. Maule. If the rules, which are applicable to common trading partnerships, were to be extended to part owners of mines, it is difficult to foresee what consequences would follow, affecting interests of the greatest magnitude, and placing many individuals of the highest rank and fortune in situations which they never contemplated.

If this mining concern had been a partnership in trade, it would have been terminated by the death or bankruptcy of any of the parties; and none of the lessees could have assigned his share, without the concurrence of the rest. Here the shares were transferable without the concurrence of the other part-owners; and the concern was not dissolved by the death or bankruptcy of any of them. It had, therefore, none of the characteristics of a partnership.

Even if we call this concern a partnership, it must be conceded that all the usual qualities of a trading partnership do not belong it; and by what rule are we to distinguish such of the qualities of an ordinary trading partnership, as belong to a concern like this, from such of them as do not belong to it?

On the whole, the parties interested in this concern must be considered as tenants in common of the mines and other premises comprised in the leases; and one tenant in common of real estate cannot, in respect of a debt due from him to another tenant in common, claim a lien, independently of specific contract, on his debtor's undivided share of the real estate.

The Master of the Rolls. The general principle is, that all property, acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership. It is true, a mining concern differs in some particulars from a common partnership: the shares are assignable, and the death or bankruptcy of the holder of shares does not operate as a dissolution: but it has been repeatedly held to be in the nature of a trading concern. In Crawshay v. Maule, lord Eldon expressed a doubt, whether, if persons, previously entitled as tenants in common to mines, were to form a mining concern, the general principles of a partnership would apply to such a case, and I am not aware that the particular point has ever been decided; but the distinction here is, that the interest in the mines was expressly acquired for the purpose of a partnership, and the general principle is therefore to be applied to it.

The defendant, Wightwick, claimed under Turton, as the purchaser of an annuity of 664*l* 18*s*. for the term of eleven years and a half. This annuity was secured on Turton's shares, and the consideration paid for it was a sum of 4000*l*. The purchase-deed contained a covenant to pay the annuity half-yearly; and the bankrupt also gave to the purchaser twenty-three promissory notes, being each for a half-year's payment, payable respectively at the successive times when the successive half-yearly instalments of the annuity would become due. It appeared in evidence, that the twenty-three half-yearly payments would pay the sum of 4000*l*., together with interest at nearly 12*l*. per cent per annum; and a question was made, whether this transaction was usurious.

Mr Bickersteth, Mr Rolfe and Mr Lovat, referred to Doe v. Gooch, 3 Barn. & Ald. 660.

[Fereday *v.* Wightwick.]

Mr Pemberton and Mr. Wilson, contrà, referred to Finch *v.* Tanfield, 1 And. 121, pl. 169, Cro. Eliz. 27 ; Cotterell *v.* Harrington, Brownl. 180 ; Rowe *v.* Bellasys, Sid. 182.

The Master of the Rolls. With respect to this question of usury, I shall not refer to the old cases which have been cited. This, in effect, is an agreement to repay the principal sum of 4000*l.*, with interest, by twenty-three instalments ; and, as it appears that the interest thus paid will exceed legal interest, the transaction is plainly usurious(*a*).

Lees *v.* Nuttall.

Russell and Mylne, 53.

If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal.

Rolls.—Nov. 24, 1829.

THE bill prayed that the defendant Nuttall might be declared a trustee for the plaintiff Lees, of all the right and interest which he had acquired in a certain estate, and that he might be decreed to convey such right and interest to the plaintiff.

The wife of the plaintiff and her sister, as administratrixes of their father, were entitled to a mortgage debt charged on the premises in question; and the plaintiff in right of his wife, and with the sanction of the sister, had long been in possession of the premises as mortgagee. He was desirous of becoming the owner of the equity of redemption, which was in the defendant Walker ; and, in 1818, he employed Nuttall as his attorney to negotiate the purchase. Various attempts were made to accomplish this object, but without success. In March 1824, a fresh negotiation was opened by the defendant Walker, who wrote a letter to Lees, proposing to sell the premises to him for 1200*l.* This letter was dated the 25th of March ; and Lees, having determined to accede to the terms, sent his son on the following day to inform Walker that he accepted his offer. On the 27th of March, the son, by the direction of his father, went to Nuttall, and, having informed him of what had been done, instructed him to draw a formal agreement of purchase, and to procure Walker's signature to it. Nuttall did not, on that occasion, profess any unwillingness to act as the agent of the plaintiff, or intimate that he was in treaty for the purchase of the property on his own account : but, within a day or two afterwards, he went over to the place of Walker's residence, and, in his own name, entered into a written agreement, dated the 29th of March 1824, for the purchase of the premises at 1100*l.* This agreement did not purport to be entered into on behalf of Lees.

The defendant, Nuttall, by his answer, claimed the benefit of the purchase, stating that, for two months before the 29th of March 1824, he had been in treaty with Walker for the purchase of the equity of redemption ; that he entered into the agreement with Walker on his own account ; and that he did not, in the transaction, consider himself as the attorney of Lees.

(*a*) See Vin. Abr. vol. xxii, Usury (F). Comyn on Usury, 43—71.

[Lees *v.* Nuttall.]

The material facts of the plaintiff's case were established by evidence.

Mr Pepys and Mr K. Parker, for the plaintiff.
Mr Bickersteth and Mr T. Parker, for the defendant.

The MASTER of the ROLLS, on the ground that Nuttall had been employed by the plaintiff as his agent for the purchase of the estate, made a decree against Nuttall, according to the prayer of the bill, and with costs.

Brough *v.* Oddy.

Russell and Mylne, 55.

A court of equity will not entertain a bill for the specific performance of an agreement to pay, in a certain event, which has happened, an annual sum by quarterly instalments.
Nov. 24, 1829.

BROUGH the elder, had deposited the title-deeds of some leasehold property with the plaintiff Mrs Brough, as a security for a sum of 900*l.* which he owed her; and he and his son, being desirous of raising money by the grant of an annuity to be charged on these leaseholds, requested her to give up the deeds to them, in order to enable them to accomplish that purpose; offering, as an inducement to her to consent to the proposal, to procure for her the indemnity of Mrs Oddy, the mother-in-law of the younger Brough. The plaintiff expressed her willingness to part with the deeds, upon having the proposed indemnity; and on the 7th of March 1823, Mrs Oddy wrote to her a letter, in which she stated that, at the request of Brough, she, Mrs Oddy, was willing, in the event of his raising money by means of the security of the leasehold premises, to become guarantee to her to a specified amount per annum. This letter was delivered to Mrs Brough by John Brough the younger; and, on receiving it, Mrs Brough gave him the title-deeds of the leaseholds. Shortly afterwards, the following memorandum of agreement, dated the 14th of April 1823, was signed by Mrs Oddy:

"By these presents be it known, that, under the following considerations, and the conditions hereinafter specified, I, the undersigned Margaret Oddy, &c., do hereby engage and make myself responsible to Mrs Mary Ann Brough, &c., for the yearly payment of the sum of 29*l.* 19*s.* 9*d.* of lawful money of Great Britain. Whereas the said Mary Ann Brough hath yielded up to Mr John Brough, &c., for his use and benefit, certain securities, which were placed in her hands by Mr John Brough the elder, &c., for securing to her the due payment of a certain sum to her annually; and whereas the said John Brough hath, by means of those securities, raised a sum of money for his benefit on annuity, for the due payment of which annuity those securities are made liable; the beforementioned Margaret Oddy doth hereby engage to pay the said Mary Ann Brough the sum of 29*l.* 19*s.* 6*d.* annually, by quarterly payments, in the event that the before-said John Brough doth not duly pay the said annuity, and by cause of which non-payment those securities shall be taken for that purpose; it being understood, that, whereas the said John Brough is, by

virtue of his marriage with my daughter, entitled, under certain circumstances and conditions, to become possessed of a sum of money, part of my present estate, should he come into such possession of such money, from and after that time this bond shall be null and void."

About the same time, the elder Brough gave the plaintiff the following memorandum:

"Received of Mrs Mary Ann Brough the lease of all my property situated in Islington, which had been placed in her hands as security; as also the counterpart of a lease of a house let to Mr Cunliffe at 48*l.* 10*s.* per annum, for the purpose of assigning that sum in payment of an annuity, which I hereby engage to return to her so soon as that purpose is accomplished."

In the mean time, the Broughs had raised a sum of money by the grant of an annuity of 40*l.* a year, which was secured by an assignment of the leaseholds. This annuity was soon permitted to fall into arrear; and Mrs Brough had been under the necessity of paying several of the instalments, in order to prevent the annuitant from enforcing his security against the leaseholds. Under these circumstances, she filed her bill, praying that the defendant, Mrs Oddy, might be compelled to perform specifically the agreement contained in the letter of the 7th of March, and the memorandum of the 14th of April; and that she, the plaintiff, might be declared entitled to be reimbursed, or indemnified against, all payments not exceeding the annual sum of 40*l.*, or the annual sum of 29*l.* 19*s.* 6*d.*, which she had made, or should thereafter be called on to make, towards payment of the annuity, in exoneration of the leasehold premises.

The defence set up by the answer was, that the intention of the parties was merely to give the plaintiff a guarantee against being made personally liable for any instalment of the annuity.

The Master of the Rolls stated, that, according to the representations of the defendant, the object of the transaction was to give the plaintiff a security against a liability which could not possibly arise; since, in no event could the plaintiff be personally liable for an annuity, to the grant of which she was not a party. Such could not have been the intention of the parties. But the true question was, whether any case was made for the interference of equitable jurisdiction, and whether the court was not under the necessity of leaving the plaintiff to her remedy at law? And his honour desired the counsel for the plaintiff to direct their attention to that point.

Mr Pemberton and Mr Girdlestone, Jun., for the plaintiff.

Subject to the annuity, the plaintiff must still be considered as equitable mortgagee of the leaseholds; and the agreement of the defendant is in substance this,—that, if there is default in the regular payment of the annuity, she will pay the plaintiff (who, in that event, must make good the annuity, in order to prevent the destruction of her own posterior security), the sum of 29*l.* 19*s.* 9*d.* by quarterly payments. In the Earl of Ranelagh *v.* Hayes, 1 Vern. 189, the court decreed the specific performance of a covenant to save the earl harmless in respect of certain payments, and directed the Master, *toties quoties* any breach should happen, to report the same specially to the court. The present case falls within the same principle. The plaintiff would have no adequate remedy at law; for she would be compelled to bring a new action every successive quar-

ter of a year. She has a right to come to a court of equity to ask such a decree as will afford her complete relief at once, and will compel the defendant to give a security on property for the due performance of the agreement of indemnity into which she has entered.

The MASTER of the ROLLS stated, that here the engagement was to pay a sum of 29*l.* 19*s.* 6*d.*, annually by quarterly payments, if a certain event happened; that, admitting the event to have happened, on which the payments were to be made, the remedy of the plaintiff was by an action at law; that a personal engagement was not an indemnity, in the proper sense of the phrase; and that he was not aware of any case in which, where the contract created only a personal obligation, the court had ordered a party to give a security on property for its due performance.

On the ground, therefore, that no case was made for the interference of a court of equity, his honour dismissed the bill, with costs.

Godfrey *v.* Little.

Russell and Mylne, 59.

In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant, or by legal evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief: and where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evidence, the court will direct a commission or an issue, as will best answer the justice of the case.

November 17, December 3, 7, 1829.

THIS was a bill filed by the president of Queen's College, Cambridge, for a commission to ascertain and set out lands belonging to the college, which were in the possession of the defendant.

It appeared that the defendant and his ancestors had, from the time of Henry VIII., been lessees, under the college, of a certain field, called Lacy Field, which, in the leases, was uniformly described as containing, by estimation, sixty acres. On the expiration of the last lease, the defendant delivered up to the college forty acres only, according to statute measure; alleging, that, by the custom of the country, there were only three roods in computed acres.

The defendant insisted, that the lands of the college were bounded by a way called the Chace-way, and were entirely on what was called "the right side of that way." The plaintiff alleged, that part of the lands of the college were on the left side of that way; but the testimony of his witnesses differed as to the quantity of land belonging to the college on that left side. The defendant claimed the land on the left side as being his copyhold property, held of a manor of which Queen's College were the lords.

Mr Rose, Mr Tinney and Mr Lowndes, for the plaintiff.

Mr Bickersteth, Mr Pemberton and Mr Skirrow, for the defendant.

It was contended, on behalf of the defendant, that, in point of fact, no

part of the lands on the left side of the Chace-way belonged to the college. Even if that point were doubtful, the right of the president of the college was purely legal; and, as there was no impediment to his proceeding at law, he ought to be left to his remedy by ejectment. No ground had been laid for the interposition of equitable jurisdiction. If that interposition was asked, because the defendant, while lessee, had, in violation of his duty as tenant, confused the boundaries, the answer was, that the fact of confusion of the boundary was denied, and that the defendant was ready, meeting the plaintiff in ejectment, to prove, that the lands claimed by the college were his own. Suppose a commission were to issue, what would the commissioners have to set out? The plaintiff did not pretend to have proved that any certain quantity of land on the left side of the road belonged to him; and a commission should always specify, how much the commissioners were to set out. The plaintiff had failed in his evidence in the cause; was he to supply the defects and remedy the contradictions of his evidence in the cause, by making a new case before the commissioners? In a suit to ascertain boundaries, a plaintiff was bound to show that he was entitled to some lands which had been confused with those of the defendants; that those lands were of a certain specified extent; and that there was some equitable ground for the interposition of the court. Wake *v.* Conyers, 1 Eden, 331; Speer *v.* Crawter, 2 Mer. 410. It was admitted, that the plaintiff had not shown what was the extent of the lands which he claimed to be his; and, either the bill must be dismissed, or, at the utmost, it could only be retained for a time, with liberty to the plaintiff to bring an ejectment.

On behalf of the plaintiff, it was replied, that the circumstance of confusion of boundaries rendered it impossible for the plaintiff to proceed by ejectment, because he could not distinguish the specific lands, which belonged to the college, from those which were the property of the defendant. Upon the evidence there could be no reasonable doubt, that a portion of the land on the left side of the road belonged to the college; and they would be entirely without remedy, unless a court of equity assisted them by either granting a commission or directing an issue.

At the original hearing the Master of the Rolls expressed himself to be satisfied by the evidence in the cause, that part of the land on the left side of the Chace-way belonged to the college; but, by reason of the difference in the testimony of the plaintiff's witnesses as to the quantity of that land, he desired precedents to be searched for, in order to ascertain whether it was the practice of the court to authorize commissioners to ascertain the quantity, or to direct an issue for that purpose.

December 3.—On this day the following cases were cited: Lethieullier *v.* Lord Castlemain, 1 Dick. 46; Metcalf *v.* Beckwith, 2 P. Wms, 376; Speer *v.* Crawter, 2 Mer. 410; Duke of Leeds *v.* Earl of Strafford, 4 Ves. 180; Willis *v* Parkinson, 2 Mer. 507; Wilkinson *v.* Allott, 3 Bro. P. C. Tomlins's edit. 684; Rous v. Barker, 4 Bro. P. C. Tomlins's edit. 660; Wake *v.* Conyers, 1 Eden's Ca. temp. Lord Northington, 331; The Bishop of Ely *v.* Kenrick, Bunb. 322.

December 7.—The Master of the Rolls. It appears, by the authorities which have been referred to, that, to sustain a bill of this nature, it is necessary that the plaintiff establish a clear title to some land in the possession of the defendant; and, according to the case in Bunbury, Bunb.

322, the court will not direct an issue to try the title, if it be left in doubt upon the evidence in the cause. It has been argued that the title of the plaintiff must appear by the admissions of the defendant, and that it is not enough that it be established to the satisfaction of the court by the evidence in the cause. That proposition is not countenanced either by authority or by principle, and is manifestly untenable; for, if such were the rule, there never could be a decree for the plaintiff in a suit of this nature, as no defendant would admit the plaintiff's title.

In this case I am of opinion that the plaintiff has established by evidence a clear title to some land in the possession of the defendant.

According to the doctrine of lord Northington in Wake *v.* Conyers, and of sir William Grant in Speer *v.* Crawter, the plaintiff must also make out that he has some equitable ground upon which to call for the assistance of this court; and he will otherwise be left to seek his remedy at law. The confusion of boundaries by the defendant, or those under whom he claims, is an equitable ground. Here the boundaries are certainly confounded; and the confusion must be intended to have been the act of those who, for centuries, have been in possession of the land. It is in evidence, that the hedge which now separates the land on the left side from the Chace-way, has been made within the last sixty years; and there is now no boundary to distinguish the particular parts of the land on the left of the Chace-way, to which the plaintiff and defendant may respectively be entitled.

When the court is satisfied with the plaintiff's title, and that he has an equitable ground for the assistance of this court, the authorities will justify the court in affording relief either by a commission or by an issue, as will best advance the justice of the particular case: and as an issue might not finally settle the question between the parties, I am of opinion that the proper proceeding here will be, to direct a commission to inquire and ascertain what part of the lands in the possession of the defendant on the left side of the Chace-way is the property of Queen's College, and to set out the same, with the usual directions in that behalf.

Davis *v.* Spurling.

Russell and Mylne, 64.

An executor, who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate.

If an error in a settled account is discovered and corrected before suit, and a bill be subsequently filed to surcharge and falsify, the corrected error is not a ground for a decree to surcharge and falsify.

If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it by such words as "but" and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff.

November 26, 27, December 3, 1829.

IN this case the bill was filed to avoid a release given upon a settlement

[Davis v. Spurling.]

of accounts relative to the assets of Whimper Bradey and John Bradey, and to have the accounts retaken, or surcharged and falsified.

Whimper Bradey and John Bradey were brothers, and they were entitled, as tenants in common in fee, to a freehold estate. Whimper Bradey, by his will, appointed John Bradey, Benjamin Colchester, and John Spurling his executors; and he empowered his brother John Bradey to sell his, the testator's, moiety of the freehold estate. If the sale did not take place in John Bradey's lifetime, then the testator directed and empowered the surviving executors or executor, as soon as might be after his brother's death, to sell the same premises: and he declared his will to be, that, whenever the premises should be so sold, the clear moneys arising from such sale, together with the rents of the premises until the completion of the sale, should be applied and disposed of in the same manner as his personal estate, subject to the payment of his funeral and testamentary expenses and debts.

After the death of the testator, the three executors proved the will; but the execution of the trusts was left almost exclusively to John Bradey: and he sold the freehold estate, as well his brother's moiety as his own moiety. In that sale he employed, as his agent, his co-executor Colchester, who was an auctioneer. Colchester, after an ineffectual attempt to dispose of the property by auction, sold it by private contract, and, on the execution of the conveyance by John Bradey, received the price of the estate from the purchaser, and paid it over to John Bradey's banker on that gentleman's separate account. The money was afterwards misapplied by Bradey.

One question in the cause was, whether Colchester was personally answerable for the misapplication by John Bradey of the price of Whimper Bradey's moiety of the estate.

Mr Bickersteth and Mr Parker, for the plaintiffs.
Mr Knight and Mr Turner, contrà.

The MASTER of the ROLLS held, that Colchester was not answerable:—that, where an executor, possessing assets of his testator, hands over those assets to a co-executor, and they are misapplied by that co-executor, there the executor, who so hands them over, shall be answerable for their misapplication, because he had a legal right to retain them, and might have preserved them, and it was his duty to do so, unless, indeed, they were so handed over for the express purpose of a special administration by the co-executor, as for the payment of a particular debt:—but that, in the present case, Colchester had no legal right to retain the price of Whimper Bradey's moiety of the estate, for it was in his hands, not as executor, but simply as agent of John Bradey, who alone had the power to sell that moiety, and to receive the price of it.

Another question in this cause arose out of the following transaction: Colchester had been the agent and farming bailiff of John Bradey, and had been directed by him, shortly before his death, to make certain payments out of a sum of 177*l.*, remaining in his hands, on John Bradey's account, and to retain the balance for his own use. The balance amounted to 129*l.*: and, acting under the impression that he was entitled to keep this sum, he had not introduced it into those accounts of John Bradey's estate, on which the defendants relied as a bar to the suit: but, within a

fortnight after the settlement of the accounts, he communicated the circumstance to the plaintiffs, stating, that he was ready to pay the money, if the plaintiffs thought he had not a right to retain it: and the plaintiffs demanded and received the 132*l.* before the bill was filed.

Mr Bickersteth and Mr Parker, for the plaintiffs.
Mr Knight, contrà.

The MASTER of the ROLLS stated, that the question was, whether, where an executor, after a settlement of accounts, confesses there was an error in the accounts, and, before suit, corrects it and pays over the amount, and a bill is afterwards filed to surcharge and falsify the accounts, the error, so corrected before suit, is a ground upon which the court can make a decree to surcharge and falsify: and his honour held, that it was not a ground upon which the court could make such a decree; for, at the time of the bill filed, there was, in this respect, no existing error, and no cause of complaint by the plaintiff.

In this cause, also, the Master of the Rolls ruled, that, if the plaintiff read a passage in the defendant's answer as evidence of a particular fact, the defendant had no right to read, as evidence, any subsequent matter, although it might be connected with the passage which the plaintiff had read by such words as "but" and "and," unless the subsequent matter was explanatory of the passage read by the plaintiff.

Bozon *v.* Bolland.

Russell and Mylne, 69.

WHERE a person, not a party to the suit, is interested in a question, and appears by counsel, and submits to be bound by the decision, the court will not hear him, without the consent of the other parties to the suit.

Rolls.—Dec. 3, 1829.

Knight *v.* Martin.

Russell and Mylne. 70.

A trustee, refusing to pay a legacy without the direction of the court, in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive.

Rolls—Dec. 7, 1829.

A BANKRUPT was entitled, under a will, to a contingent legacy of 2000*l.* after the death of his mother, to whom it was given for life. The mother died, and his interest became absolute. His assignees then applied

to the trustees under the will for payment of it; but they declined to pay it without the direction of a court of equity, solely because the bankrupt set up a claim to it.

The question was as to the costs of the suit, which the trustees had thus compelled the assignees to institute for the recovery of the legacy.

Mr Bickersteth and Mr Booth, for the plaintiffs.

Mr Pemberton and Mr Palk, for the trustees, declined to argue that the reversionary legacy did not pass to the assignees, but submitted that, as the trustees had been entangled between conflicting claims in consequence of the bankrupt insisting that he was entitled to the legacy, they ought to be indemnified out of the fund.

The MASTER of the ROLLS. If it be possible to assign any reasonable ground for the refusal of the trustees to act without the direction of the court, it is for the interest of the public that the costs of the trustees should be paid to them. If the trustees had taken the trouble to consult any professional person, they must have been advised that the claim of the bankrupt afforded no colour for declining payment of the legacy to his assignees. They may, however, have acted from mere ignorance, and not from any improper motive, and, therefore, though I will not give them their costs, I will not make them pay the costs of the plaintiffs.

Harrison *v.* Harrison.

Russell and Mylne, 71.

Where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase-money is an interest in land, within the statute of mortmain; and the purchase-money will not pass by his will to a charity.

A testator bequeathed "to the two sons and the daughter of A. B. 50*l.* each:" at the date of the will and the death of the testator A. B. had one son and four daughters; each of these five children is entitled to a legacy of 50*l.*

Rolls.—Dec. 7. 1829.

IN this case the testator had entered into a contract to sell a part of his real estate, but no steps had been taken to carry the contract into effect during his life, nor had any part of the price been paid. A question was made in the cause, whether, as the contract was completed after his death, the purchase-money would pass by the will to a charitable use.

Mr Wray, on behalf of the crown, contended, that the purchase money would pass as part of the fund which had been given to certain charities. In equity, the testator had, at the time of his death, ceased to be the owner of the land; all that he was entitled to was a sum of money, which, if he had died intestate, would have belonged to his administrator and not to his heir at law. This money was not land; neither was it to be laid out in the purchase of land: it therefore did not come within the 9 Geo. 3. c. 36.

Mr Bickersteth and Mr Jeremy, contrà.

[Harrison *v.* Harrison.]

The MASTER of the ROLLS ruled, that the lien of the testator upon the land for the amount of the purchase-money, was an interest in land under the statute of mortmain.

By the will, the testator bequeathed, "to the two sons and the daughter of Thomas Lovell, 50*l.* each."

The Master found, that, at the time of making the will and of the death of the testator, Thomas Lovell had five children living, namely, one son and four daughters, and not two sons and one daughter.

The following cases were cited: Tomkins *v.* Tomkins, 19 Ves. 126, in the notes; Scott *v.* Fenoulhett, 1 Cox, 79, and Garvey *v.* Hibbert, 19 Ves. 125.

The MASTER of the ROLLS held, that each of the five children was entitled to a legacy of 50*l.*

Baily *v.* Taylor.

Russell and Mylne, 73.

A plaintiff who complains of a piracy of his work, has no remedy in equity, unless he establish a title to an injunction; and then the account will follow.

The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter, which is the subject of the alleged piracy, forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years.

Rolls.—Dec. 10, 11, 1829.

IN 1824, the plaintiff filed his bill for an injunction to restrain the defendant from publishing the second and third editions of a work, in which he had copied thirteen tables of calculations as to the value of leases and annuities, which had been published by the plaintiff in three works—one printed in 1802, another in 1808, and the third in 1810: and the bill also prayed an account.

The first edition of the defendant's work was published in 1811; and the plaintiff admitted that he had licensed that edition, on condition that the defendant acknowledged in his preface, that he had copied some of his tables from the plaintiff's works. The defendant published a second edition in 1820, and a third edition in 1823.

In December 1824, soon after the filing of the bill, the plaintiff moved before the Master of the Rolls, who was then Vice-Chancellor, for an injunction to restrain the publication of the defendant's work. The motion was refused, upon the ground, that the tables complained of as pirated, formed a very inconsiderable part of the plaintiff's work, and could be calculated by any competent person in a few hours; and also, on the ground of the length of time which had elapsed since the publication of the second edition of the defendant's book.

Notwithstanding the refusal of the injunction, the plaintiff proceeded with his cause, and brought it on to a hearing.

The defendant proved that the successive editions of his book had been regularly and openly advertised and sold: and an actuary, who was ex-

amined on his behalf, stated, that, in his judgment, 7*l.* 19*s.* would be a fair and reasonable charge for re-calculating and furnishing in manuscript the tables which had been borrowed from the plaintiff's works.

A fourth edition of the defendant's book had been published in 1825, and a fifth in 1828.

Mr Bickersteth and Mr West, for the plaintiff.
Mr Fonblanque and Mr Wakefield, contrá.

On the opening of the cause, the MASTER of the ROLLS desired the counsel of the plaintiff to consider, whether, if they failed in showing that they were entitled to an injunction, the court could make any decree, except for the dismissal of the bill; and the hearing stood over, in order that they might look into authorities on that point.

When the cause came on again, the counsel for the plaintiff contended, that, as there had been a piracy of a part of the plaintiff's work, he was entitled to protection for the future, and that the amount of the past injury ought to be ascertained, either by a reference to the Master, or by directing an issue. The defendant had made profit by publishing that which was in truth the property of the plaintiff; and to an account of these profits the plaintiff was entitled; for, without an account, there would be no means of assessing accurately his damages at law.

On the other hand, it was insisted, on behalf of the defendant, that the grounds, on which the court had refused the motion for the injunction, were equally valid against awarding an injunction by the decree. These grounds were, the length of time during which the plaintiff had acquiesced in the alleged piracy; the very small proportion, which the tables said to be pirated bore to the whole mass of the plaintiff's and defendant's respective books; and the facility with which the defendant might acquire a title to the tables which were the subject of complaint. If the plaintiff had sustained any injury, he might seek compensation by an action at law; if he thought that an account of the proceeds of the sale of the defendant's work would be necessary or useful in that action, he might file a bill for a discovery; but where he failed in establishing his right to equitable protection by means of an injunction, why should the jurisdiction, in a matter which related merely to the invasion of a legal right, be transferred from a court of law to a court of equity?

The following cases were cited:—Dodsley *v.* Kinnersley, Amb. 403; Barfield *v.* Nicholson, 2 Sim. and Stu. 1; Whittingham *v.* Wooler, 2 Swans. 428; Mawman *v.* Tegg, 2 Russ. 385; Cary *v.* Kearsley, 4 Esp. 168.

The MASTER of the ROLLS. This court has no jurisdiction to give a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case, the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law.

I agree, that although the plaintiff failed, upon the answer of the defendant, to obtain an injunction, he is at liberty to claim it at the hearing. The question, then, is, whether the court ought to grant an injunction as the case now appears? Considering the very inconsiderable part of the defendant's work which is complained of, and that this may be calculated

[Baily *v.* Taylor.]

in a few hours, so as to give the defendant an unquestionable right to its republication; and considering the difficulty which would be imposed upon the Master, if an account were directed, of ascertaining what part of the defendant's profit ought to be attributed to the plaintiff's tables; and considering also the distance of time at which the injunction is now sought, being nine years after the publication of the defendant's second edition, I am bound to refuse the injunction, and to leave the plaintiff to seek his remedy at law; and the injunction being refused, there can be no account. The bill must, therefore, be dismissed, and with costs.

Brown *v.* Brown.

Russell and Mylne, 77.

UNDER the 18th of the new orders, publication may be enlarged on affidavit, without notice.

June 1, 4, 1829.

Freme *v.* Best.

Russell and Mylne, 79.

IN general, under the 13th order, a motion for leave to amend a bill which has been previously amended, must be made on notice.

November 4, 1829.

Smith *v.* Evans.

Russell and Mylne, 80.

FORMAL amendments will be permitted to be made, without notice, though the bill has been amended previously.

November 24, 1829.

Cottingham *v.* Potts.

Russell and Mylne, 81.

A SECOND order, giving the plaintiff leave to amend, made upon an ex parte application.

February 1, 1830.

Fellowes *v.* Lord Gwydyr and Page.

Russell and Mylne, 83.

It is no defence to a bill for specific performance by the vendor, that during the treaty he falsely assumed the character of agent for another, when, in fact, he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom the contract was made, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise.

Nov. 13, 16, 1829.

THE material facts of this case are stated in Mr Simon's Reports, vol. i, p. 63.

The defendant Page appealed from the decree of the Vice-Chancellor.

Mr Horne and Mr Keene, for the plaintiff Fellowes, argued, that though the written agreement purported to be signed by Fellowes on behalf of lord Gwydyr, it was manifest from the evidence in the cause, that the defendant Page knew, or at least might have known, that the plaintiff was really the principal in the transaction. But whether the defendant did, or did not know it, that circumstance could make no possible difference, since no loss could be shown to have accrued to the defendant from his ignorance, and no improper motive for concealment, if any had been practised, could be imputed to the plaintiff. At all events, the defendant Page, by taking possession of the articles contracted for, and proceeding to sell them off after he was fully informed of the truth, must be considered to have acquiesced, and to have waived any objection on the ground of mistake or misrepresentation. It would be too much for him now, after the bargain had been carried into effect, to turn round on the plaintiff, because the speculation had proved a losing one, and attempt to repudiate the contract, while he retained at the same time in his hands a large portion of the purchase-money, as well as the whole produce of the sale.

Mr Bligh, for lord Gwydyr, who disclaimed all interest in the matters in question, stated, that his lordship gave the plaintiff no authority to use his name, and took no part himself in the negotiation.

Mr Pepys, Mr Knight and Mr Warry, for the defendant Page, contended, that upon the whole of the evidence, a case of deliberate and systematic fraud on the part of the plaintiff had been sufficiently established. It was plain that a series of artifices had been resorted to for the purpose of keeping Page in the dark as to the real nature of the transaction: all leading him to believe, that he was dealing with lord Gwydyr through the agency of Fellowes, when, in point of fact, Fellowes was negotiating solely on his own account. What else could be the plaintiff's object in affixing his signature to the contract, in the name and as the agent of lord Gwydyr,—in holding the meetings, at which the terms of the purchase were arranged, at the office of his lordship's solicitor,—in permitting that solicitor to propose alterations as to the time of payment, and submitting the agreement to him for his approval,—in using language throughout the whole of his correspondence which would naturally confirm the defendant's original impression, that the plaintiff was only acting by his lordship's direction, and which was, in truth, capable of no other rational construction?

[Fellowes *v.* Lord Gwydyr and Page.]

That Page himself was imposed upon was obvious from the circumstance, that the first cheque he gave the plaintiff, in part payment of the purchase-money, was drawn payable to lord Gwydyr. On any other supposition, indeed, his conduct would be most strange and unaccountable; since, if he had been aware, as it had been insinuated he was, that his lordship was no party to the sale, was it likely he would have rested satisfied with a contract, in which he was himself the only person that was bound? His subsequent conduct, however, abundantly proved that he did not so understand it. The instant he discovered his mistake, he exclaimed against the deception that had been practised upon him, and did every thing he could to escape from its consequences.

The Lord Chancellor observed, that he thought it sufficiently made out, that the effect of the plaintiff's conduct had been to mislead Mr Page.

For the defendant. Here then we have proved an industrious suppression and misrepresentation, which had the effect, whatever was the object, of misleading the defendant as to a most important ingredient in the contract, as to the person, namely, with whom he had really contracted; and it is too late to contend now, after the cases of Phillips *v.* The Duke of Bucks, 1 Vern. 227; Harding *v.* Cox, 1 Vern. 227, n.; Eyre *v.* Popham, 1 B. C. C. 95, n., and other cases, the authority of which has been expressly recognized by lord Eldon in Bonnet *v.* Sadler, 14 Ves. 526(*a*), that wilful concealment, *à fortiori* misrepresentation, upon so material a point, will not of itself be sufficient to avoid the agreement in equity. It matters not with what object, whether fraudulent or otherwise, the misrepresentation was employed, or whether it was intentional or not. The simple fact of misrepresentation alone, more especially if, as here, it succeeded in misleading the defendant, has always been considered a decisive answer to a bill for specific performance.

In reality, however, there was a motive, and that an obvious and most improper one, for the course adopted by the plaintiff: and even if its existence were not fully made out in evidence, we should have a right to infer it from his conduct; for wherever a contracting party, during the progress of the treaty, studiously suppresses or misrepresents circumstances; wherever, by falsehood, he induces error in the mind of the other party, he will be presumed to have so acted for purposes of fraud, unless he can satisfactorily rebut the presumption. The defendant Page, as the plaintiff well knew, had been long connected with the family of lord Gwydyr. He had been employed, in the way of his trade, by his lordship's father, to sell the fittings-up of Westminster Hall after the trial of lord Melville; he had claims against the late lord's personal representatives, to a large amount, outstanding and unsettled, and independently of the hope of something like a set-off (which appears only by the answer, and which strictly, perhaps, could not be made available against the present lord), he was naturally desirous to keep up his connexion with a powerful nobleman, whose patronage was well worth some sacrifice, by catching, even improvidently, at a contract, which, if it did turn out an unprofitable bargain, his lordship, he felt assured, was too generous to enforce to the utmost letter. None of these inducements would have influenced his mind, in dealing with an obscure individual and a stranger,

(*a*) Some other cases are mentioned in Sugden's Vendors and Purchasers, 200, 201, seventh edition.

like Mr Fellowes; and Mr Fellowes of course, by carrying on the negotiation under cover of lord Gwydyr's name, really obtained all the additional advantage estimated in money, which such considerations gave to the transaction in the eyes of Mr Page. It is, therefore, no more than a reasonable inference, that Page, if at all, would not have contracted with the plaintiff on the same terms—the terms now sought to be enforced—as he did when he acted under the impression that he was dealing with lord Gwydyr.

The jurisdiction of courts of equity to compel the specific performance of agreements, is a matter purely discretionary: and in the exercise of that discretion it has always been a rule, that the party seeking equitable relief must come with clean hands. The misconduct of a plaintiff operates as a personal disqualification, which the court invariably notices, and of which the defendant may avail himself as a bar to the demand(*a*), without being called upon to show that he has sustained any special loss or injury in consequence. Here it is admitted, that Fellowes was guilty of studied duplicity, which had the effect of deceiving the defendant, and which, we are entitled to assume, was intended to deceive him. Can a plaintiff, under such circumstances, be permitted to claim the extraordinary relief, which, in an honest case, the court will give by decreeing the agreement to be specifically executed, or will it not rather leave the parties to proceed at law? It is said, that, in this instance, no relief could be had at law, because the contract was signed in the name of lord Gwydyr, who, having taken no part in the transaction, now refuses to lend his name to any legal proceedings instituted with a view to carry it into effect. But that only furnishes a stronger reason why this court should decline to interfere. The plaintiff either had, or had not, a right to make use of lord Gwydyr's name. If he had, this court would compel his lordship, on a bill filed for that purpose, to allow an action to be brought in his name, on behalf of the plaintiff. If he had not (and that such was the fact, appears from the statement of his own bill), it is a further instance of the plaintiff's unfair and dishonest dealing, which would of itself deprive him of any title to equitable aid.

The contract, besides, has no mutuality. If lord Gwydyr or Mr Fellowes had refused to perform it, Mr Page, it is clear, however fairly and openly he might have acted, could never have enforced it specifically against either, but must have resorted for relief to a legal tribunal. In truth, the suit here is altogether improper. It prays a specific performance, though, in the events that have since occurred, the articles having been sold off, and a portion of the price paid, performance can consist in nothing more than paying the balance of the purchase-money. In other words, it calls upon the court to invade the province of a jury, and assesses the damages which the plaintiff has sustained by Page's refusal to complete his bargain. It is unquestionable, that, if the contract had been originally drawn in the name of Fellowes himself, as common sense and plain dealing would have dictated, its subject-matter is of such a kind, it being for payment of money on the one hand, and for delivery of goods on the other, that the vendor could never have come here for assistance, but must have been left to make the most of his legal remedy. And is he to be actually placed in a better situation—is the more powerful arm of a

(*a*) See on this subject the observations of sir T. Plumer, M. R., in the cases of Clermont *v.* Tasburgh, 1 J. & W. 119, and Woodhouse *v.* Meredith, ib. 223.

court of equity to be extended to him, merely because, through folly or fraud, he has framed the contract in a way which deprives him of that remedy? Such a principle, once admitted, would be a direct encouragement to negligence and deception; every blundering agreement of every petty tradesman with the wholesale dealer who supplies his stock, might be made the foundation of a suit in chancery; and the line of separation between the two jurisdictions would be totally destroyed.

Mr Page never acquiesced in the transaction, after he became acquainted with the facts. He was compelled, for his own safety, to proceed to sell off the articles without delay, that the hall might be cleared by a certain day, according to the terms of his undertaking to lord Gwydyr. But so far was he from thereby intending to waive his objections to the contract, that every thing he subsequently did was under protest. He kept a regular account of the proceeds of the sale, which he is ready to produce and verify; and he is willing to pay over the amount to the plaintiff, after deducting the sum he has already paid, and the usual allowance for his commission as a broker on the sale.

The Lord Chancellor. Mr Page, I am satisfied, had every reason to believe that he was contracting with lord Gwydyr; but the only question here is, what loss or inconvenience has he sustained in consequence of acting under that mistake? There is nothing in the cause which can lead me to suppose, that he would not have contracted with the plaintiff, or that he would have declined to offer the sum of 1500 guineas, had he been aware of the party who was really the owner of the property. It was strongly pressed upon me in the argument, that the parties should be left to proceed at law. But from the situation in which they respectively stood, as well as from the form of the agreement, they could not have obtained an effectual adjudication upon their rights at law, and it was necessary for the plaintiff therefore to come into this court. Mr Fellowes says, that the name of lord Gwydyr was not used for any improper purpose; but even if it were otherwise, that circumstance alone would furnish no reason why Mr Page should be released from his contract, without showing that the deception had in some way operated to his prejudice.

Decree affirmed without costs.

Fraser *v.* Byng.

Russell and Mylne, 90.

Equal sums given to the same person by a will and codicil, held, from the character and objects of the latter, to be substitutional and not accumulative, although the legacy given by the codicil was only conditional.

Nov. 16, 1829.

THE will of John Byng, Esquire, made during his residence in India in the service of the East India Company, and bearing date the 21st of April 1808, after appointing executors, proceeded in the following terms: "I give and devise to my natural daughter, Cecilia Georgiana, now under

the care of my dear sister Mrs Fraser, the sum of 5000 pagodas, placed in the hands of Messrs Harrington and Co. a company's bond bearing eight per cent, and with whatever interest may be due upon the said bond; and the said executors on no account to call upon Mrs Fraser for any sum or sums disbursed upon the education of the child under her protection. Item, I give and devise unto my natural child John, under the care of Mr Griffiths, of Madras, the sum of 1000*l.* or 2500 pagodas; I give and devise to my dear wife, Eliza Amelia Byng, after paying any debts and legacies, the residue and remainder, entirely to go to my dear wife, which I suppose to amount to 30,000 pagodas, besides the bond due to me by Messrs Chase and Co., and other debts from various persons, amounting to about 3000 pagodas more. If any accident should befal my dear wife, the whole of my property to my child George Percy Byng; but if she lives, the whole of my property to be entirely and solely at her disposal."

The testator afterwards, when at Trichinopoly, executed another testamentary paper, bearing date the 19th November 1811, which was in part in the following terms:—"I John Byng, of, &c., do hereby add the following clauses to my last will and testament. As some mistakes may occur regarding the 2000*l.* sterling bequeathed to my natural daughter Cecilia, this is to state that 1000*l.* sterling of the above sum is in the hands of the honourable Mrs Hopwood, and about 800*l.* sterling is in the hands of my brother George Byng, Esquire; now, if any difference should be wanting to make up the aforesaid principal sum of 2000*l.* sterling, I will that the residue wanting is to be taken from the aggregate of my fortune, and the aforesaid sum of 2000*l.* sterling so completed is to be paid into the hands of Captain Percy Fraser, in trust, for the use of my aforesaid natural child, Cecilia, to be paid to her on her attaining the age of twenty-one years, or on her marriage, should she marry before attaining that age, together with any interest that may have accumulated thereon, after deducting the expenses of her education and support. I also bequeath to my natural son, John, under the care of Mr Griffiths, at Madras, the sum of 1000*l.* sterling, to be paid to him on his attaining the age of twenty-one years, with any interest that may have accrued thereon, after deducting the expenses of his education and support; but I do hereby will, that, in the event of my aforesaid natural child, Cecilia, dying before her marriage, or her attaining the age of twenty-one years, the aforesaid sum of 2000*l.*, with any interest that may have accrued thereon, is to revert to my lawful children. I also will that, in the event of my natural son, John, dying before he has attained the age of twenty-one years, the aforesaid sum of 1000*l.*, with the interest that may have accrued thereon, is also to revert to my lawful children. I further will, that the yearly interest arising from the aggregate sum of which I may be possessed, or which may hereafter devolve to me, after the several legacies are paid, shall be paid by regular instalments to my dearly beloved wife, Amelia Byng, for her own use and for the education of my lawful children, to be enjoyed by her during the term of her natural life, but in the event of her death or her again marrying, the whole yearly interest to be laid out, or such part as may be necessary, for the education of my lawful children, and the principal, with the interest that may remain thereon, if any, to be divided amongst them in equal shares, the several shares to be paid them on their respectively attaining the age of twenty-one years."

The rest of this instrument, which contained no further bequests, had

reference principally to the nature and particulars of the testator's property; and it gave directions to certain of his friends in India, whom he requested to undertake the management of his affairs, as to the mode in which his outstanding effects were to be collected and applied. It also appointed guardians for his lawful children, and spoke of what he had done by his former will, and of "these clauses added to his last will and testament." There was no new nomination of executors.

The testator died in 1812, and probate of the two testamentary papers as a will and codicil was granted by the ecclesiastical court to G. P. Fraser, one of the executors.

Sometime afterwards, a bill was filed for the purpose of having the accounts taken, and the necessary funds raised and set apart for the payment of the different legatees. By the decree in the cause, bearing date the 2d of May 1818, and pronounced by Sir John Leach, then Vice-Chancellor, it was (among other things) declared that the legacy given by the codicil to the appellant, John Byng (the natural son of the testator), was a revocation of the legacy of 1000*l.* given to him by the will, and was not accumulative. At the date of the decree, John Byng was an infant, and when he came of age, several years after, the order he obtained for payment of the sum which had been appropriated to answer his legacy of 1000*l.* was made without prejudice to any proceedings he might be advised to take with a view to get the decree varied. And he now appealed against so much of the decree as declared the second to be a revocation of the first legacy, and not an addition to it.

Mr Horne and Mr Phillimore, for the appellant.

The general rule is, that, when a legacy is given by a will, and another is afterwards given by a codicil, to the same person, the testator is held to have intended that the legatee should take both, unless strong circumstances appear on the face of the instruments themselves, raising an opposite presumption. Here, however, there is nothing of the kind; on the contrary, the probabilities, as far as they can be collected, point directly the other way. This second instrument is no more than a codicil, or as the testator himself styles it, "clauses added to his last will and testament," and it is clear from its tenor, that it was written while the first was lying before him, or at least was fully present to his mind. He commences it by anxiously explaining his wishes (which he was afraid might be misunderstood), with respect to the sum he had already bequeathed to his daughter, and then having that prior bequest, and no doubt also the bequest which he had made to the appellant his son, in his recollection, he proceeds in these terms: "I also bequeath to my natural son, John, the sum of 1000*l.* sterling, to be paid to him on his attaining the age of twenty-one years." Nothing can be more distinct or explicit. The testator knew that he had by his will bequeathed 2000*l.* to his daughter: by the codicil, he gives directions to his executors with regard to the funds to be applied in payment of that sum, expressly referring to it as the identical sum given by his will. He knew, too, that he had bequeathed 1000*l.* to his son. But in the codicil he makes no reference whatever to that legacy, and goes on to use words of bequest to him, which can import only a new, substantive, and independent gift. What can be the reason of this marked diversity? Simply, that the testator's object was different in the two cases. He intended merely to regulate the property which the daughter was to take, but he wished to make a reasonable addition to the fortune

which he had bestowed upon his son. Two thousand pounds he probably considered an ample provision for a girl living under the care of her paternal relatives; but half of that sum, he justly thought, was a scanty allowance for a boy who had to make his way in the world, and who would require almost the whole of it as an advancement to start him properly in life. He was therefore naturally desirous to put both children on an equal footing. His fortune had increased considerably in the interval between the date of the two instruments, as appears from the latter, so that he could indulge his inclination without inconvenience; and he has accordingly effected his purpose in the codicil, by which he distinctly gives 1000*l.* to his son, well aware all the while that he had previously given him a similar sum by the will. If he had intended the subsequent as a substitution for the former legacy, he would certainly have said so; more especially as his attention was directly drawn to the circumstances in which the son stood, by the reference, in the immediately preceding sentence, to the provision he had made for the daughter, in whose case, as he meant to bestow no additional bounty, he took care to use language that imported none.

Each of the two instruments, taken separately, is defective. In order to collect from them the complete expression of the testator's mind, we must view them in connexion, as forming one entire testamentary act, and they will then appear perfectly consistent and explicit. Reading them in that way, their effect may be thus rendered: "I give to my daughter 2000*l.* absolutely; on second thoughts, it had better be conditional only, and be paid, when due, out of such and such funds. Item, I give to my son 1000*l.* absolutely: I also bequeath to him 1000*l.*, to be paid at twenty-one, in the event of his attaining that age, otherwise to go over." Here we see the force of the word "*also*," which plainly shows the testator meant an addition.

It will be said, that the sums given in the will and the codicil are the same in amount: but that circumstance, by itself, is not sufficient to raise a presumption that the one was intended in substitution for the other. Ridges *v.* Morrison, 1 B. C. C. 389, and the cases there referred to; Baillie *v.* Butterfield, 1 Cox, 392. If, however, such a presumption could for a moment be admitted, it would be effectually repelled by considering the very different character of the two legacies. The one is an absolute gift, vesting immediately, and the principal of which was of course applicable, either wholly or in part, to the boy's advancement. The other is conditional only, to vest on his attaining twenty-one, and, in the event of his dying under that age, to go over to the lawful children of the testator. It is a fund which could not by possibility be broken in upon while the contingency lasted, not even for the necessary purpose of putting him out in trade, or instructing him in a profession. The two legacies, therefore, though nominally the same, are by no means equal in value; the latter being far less beneficial than the former, a circumstance which, in the case of M'Kenzie *v.* M'Kenzie, 2 Russ. 262, lord Eldon held to be quite conclusive in favour of accumulation. It is observable, too, that the codicil speaks of the surplus interest that might accumulate during the son's minority; and no doubt a surplus might remain beyond what was requisite for his support and education, if both the sums were to be taken: but it is not to be supposed that the testator could have contemplated the possibility of such a surplus, after satisfying those purposes out of the interest of 1000*l.* According to the construction contended for on

the other side, the appellant was to have, during his minority, the interest of only one sum of 1000*l.*, and not a shilling of the principal could be touched, not even to insure his success in life, unless he attained twenty-one. That never could be the object of a considerate parent. According to our construction, the appellant would have the interest of 2000*l.* to be employed towards his maintenance and education, and one half of that sum would be applicable at the discretion of his trustees, and under the sanction of the court, to any advancement for his benefit, while the remainder would be vested and payable as soon as he came of age, an arrangement at once natural and judicious. On the whole, unless this clause of bequest is to be read as a revocation, in contradiction to its express language, and in violation of every fair presumption of intention, the appellant is entitled to both the legacies.

Mr Kindersley, contrà.

Where the legacies are given *simpliciter*, and there is nothing to assist conjecture, the general rule in favour of accumulation may perhaps be admitted; although where the legacies are equal in amount, even that has sometimes been denied(*a*). But certainly the doctrine cannot be carried farther; for the presumption is extremely slight, and any intrinsic evidence, supplied by the testamentary instruments themselves, is sufficient to turn the scale, and throw on the party claiming the double bequest, the burthen of supporting his claim by parol testimony. The general rule, therefore, is subject to an important exception, fully established by authority, and bearing directly on the present question, viz., that, wherever the testamentary papers contain a series of bequests, comprising the same property, and corresponding pretty nearly in number and value, to a numerous class of legatees, there repetition and not accumulation shall be presumed. And this exception is founded in good sense; for though it is possible enough for a testator to mean an addition, when by codicil he simply gives a sum to the same individual who was to take a similar sum by his will, it is far less likely that he should repeat a whole line of bequests to a variety of legatees, without the least reference to what the first instrument had done for them, unless he intended the second to be substituted for the first.

That principle was the foundation of lord Hardwicke's decision in the Duke of St Alban's *v.* Beauclerk, 2 Atk. 636. In that case, legacies given by two distinct codicils to the same legatees, though they differed in amount, and though an annuity given by the one was not noticed in the other, were held to be substitutional. So in Coote *v.* Boyd, 1 B. C. C. 448, and 2 B. C. C. 521, where the second codicil appeared with some slight variations to be a mere repetition of the first, though both were proved in the ecclesiastical court, and it was not pretended that the one was meant to be a revocation of the other, lord Thurlow decided that the legacies were not doubled. In Attorney-General *v.* Harley, 4 Madd. 263, there were two testamentary papers giving the same sum to the same individual, but with a material alteration in the terms and nature of the bequest, it being in the one absolute, in the other conditional, and yet that was held to make no difference, and only one legacy was allowed. Barclay *v.* Wainwright, 3 Ves. 462; Gillespie *v.* Alexander, 2 S. & S. 145, was the case of a will and codicil, and was in other respects very analogous to the pre-

(*a*) See the observations of lord Thurlow, in Moggrigde *v.* Thackwell, 1 Ves. Jun. 473, and of sir W. Grant in Benyon *v.* Benyon, 17 Ves. 42.

sent. The codicil in that case gave a variety of legacies; some of them to the same, others to a less, and others to a larger amount (and so far it is a stronger case than ours), and it nowhere pretended to revoke the prior testamentary paper; nevertheless it was determined that the sums bequeathed to the same legatees were not additional, but substituted. The case of M'Kenzie *v.* M'Kenzie may seem at first sight inconsistent with the others, but it is clearly distinguishable, for the codicil there not only positively recognized and confirmed the will in all other respects, but most of the sums bequeathed by it were different in value, and as to several in which the testator intended revocation, he expresssly said so, thereby raising a strong implication that as to the rest he had no such intention.

The same principle ought to hold, perhaps even more strongly, in a case like the present, where the subsequent testamentary paper, though it cannot be said to repeat a series of bequests, does what amounts to the same thing, by embracing within the range of its bounty all the objects for which the prior instrument had provided. This professes indeed to be a codicil, but it is really a kind of supplemental will, having reference to the distribution of the whole of the testator's property. It takes up the former will as the basis of the proposed distribution, and, proceeding as it were in parallel lines with it, explains and remodels the dispositions which that had made. It contemplates no new gift (unless the bequest to the appellant is to be so construed); for its single purpose is to modify and abridge, while, as to their general amount it ratifies the interests previously given. The second may, therefore, be considered as a substitution for the first instrument, except where, as in the instance of the daughter's legacy and the nomination of executors, it expressly confirms and adopts it. In each of them the testator divides his fortune into three portions. One of these he gives to his natural daughter; another to his natural son; and the third, the residue, comprising the great bulk of his property, to his wife and family. In the codicil he first considers the case of the daughter, and distinctly recognizing the sum which he had already bequeathed to her, proceeds to regulate and qualify the gift. He then adverts to the legacy given to his son; and, as he had spoken and approved of the 2000*l.* bestowed on the daughter in the preceding clause, so, in the next, he repeats that he also gives to his son 1000*l.*, stating that he means it to be taken subject to the same conditions. The word "also" indicates naturally enough the transition of the testator's mind from the one bequest to the other, and it indicates no more. Finally, he addresses himself to the consideration of the residue, which had been left to his widow absolutely, or in the event of her death, to his only lawful child; and, without professing to revoke that disposition, he does, in effect, make a totally different distribution, bequeathing what he calls the aggregate of his property, after payment of the legacies, to the widow for life or widowhood only, with remainder among all his lawful children.

It is impossible not to perceive from this comparison, that the two instruments are commensurate, and that their several parts have a mutual relation; and the inference is natural and almost unavoidable, that, as far as the one overrides the other, they cannot stand together. To that extent the codicil is virtually a revocation; the 1000*l.*, which it gives, is the same 1000*l.* which the will had previously given, and the consequence follows of course, that the legacies are not accumulative.

Besides, had the intention been different here, why should the testator, when he was carefully guarding against the lapse of the daughter's portion,

and of the 1000*l.* given to the son, by a bequest over to his lawful children, have neglected a similar provision with respect to the 1000*l.* mentioned in the will, if that was meant to be a separate gift? The motive for the precaution, that the son was a natural child, and that otherwise the legacy would go to the crown if he died in infancy, would have applied with equal force to the first legacy as to the second, and yet when his attention is directly drawn to it by the reference to the daughter's situation under the will, he takes no notice of it whatever, a circumstance which proves beyond a doubt, that in the will and codicil he considered himself as speaking of one and the same sum. As to the alleged increase of his property, the codicil shows that his family had increased in at least an equal proportion. In every case of this kind the single inquiry is, what did the testator really intend. For the purpose of ascertaining that point, it is necessary to weigh all the circumstances, to place the instruments in juxta-position, and to compare attentively the whole scope and import of each; and if we do so in this instance, we cannot fail to arrive at a conviction, that in the codicil the testator was merely repeating and not enlarging his bequest.

Mr Horne, in reply.

The Lord Chancellor. There can be no doubt, I apprehend, as to the general rule. The only question here is, whether there is sufficient to show that this codicil was intended to operate as a substitution for the legacy given by the will. My own opinion is, and has been from the first, that the codicil was intended as a substitution, or rather as a qualification of the will. [Here his lordship stated the material parts of the will and codicil, and observed, that the latter ran over and reviewed the whole of the dispositions in the will.] The testator intended by the codicil to give directions to qualify the different legacies. In the first place he says, as to his natural daughter, the fund for the payment of her legacy has shifted, and he makes a provision for that circumstance. Then, in a subsequent clause, he qualifies the absolute gift to her, by saying, that, in the event of her dying under twenty-one and unmarried, her legacy shall go over. In precisely the same terms he next qualifies the legacy of 1000*l.* given to his natural son; and if he had intended that gift of 1000*l.* to be accumulative and not in satisfaction of the sum given by the will, no reason can be assigned why one half only should be directed to go over. The principle of all the cases on this subject depends upon the question, whether you can collect from the whole of the instruments taken together, an intention on the part of the testator to substitute the one legacy for the other. I think you may, from the circumstances in this case. The judgment of the court below ought, therefore, to be affirmed(*a*).

(*a*) Most of the authorities upon this subject have been collected by Mr Geldart, in a note to the sixth volume of Maddock's Reports, p. 303, under the case of Wray *v.* Field, which is also reported on appeal in 2 Russ. 257. The subsequent cases are Hemming *v.* Gurrey, 2 S. & S. 311; M'Kenzie *v.* M'Kenzie, 2 Russ. 262; Lord *v.* Sutcliffe, 2 Sim. 273. The judgment of sir John Leach, Vice-Chancellor, in Hemming *v.* Gurrey was subsequently carried by appeal to the house of lords, and finally affirmed by lord Eldon. 1 Bligh, N. S. 479.

If the different instruments are exactly co-extensive in their provisions, and, in other respects, are so nearly identical as to satisfy the judge that they could never be intended to exist together, probate will be granted only of the latest in date, and the others will be held to be virtually revoked. Methuen *v.* Methuen, 2 Phillim. 416. And parol evidence will be resorted to, if

Clark *v.* Dew.

Russell and Mylne, 103.

A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir at law.

A party who is in contempt for disobedience to an order in a cause, is not thereby precluded from making a motion in another cause having reference to a distinct subject, though between precisely the same parties. *Semble.*

Nov. 18, 1829.

THIS was a motion, on behalf of the plaintiff, Thomas Clark, for the appointment of a receiver of certain real property, to which he and his brother and co-plaintiff, Valentine Clark, claimed to be beneficially entitled, under the will of their deceased uncle Eli Stott. The bill was filed by the Clarks against the devisees in trust, and against the heiress at law, Mrs Dew and her husband, for the purpose of establishing the will, and carrying the trusts of it into execution, as far as related to the real estate of the testator; and it prayed an issue *devisavit vel non* to try the validity of the will, and that a receiver might be appointed in the meantime.

The defendants, Mr and Mrs Dew, by their answer admitted, that the supposed will had been duly executed according to the statute of frauds, but they altogether denied its validity, inasmuch as the testator was not, at the time of its execution, of sound and disposing mind, memory, and understanding. They further stated, that the property in question consisted merely of a slip or landing-place at Rotherhithe, which was let at a rent of eighteen guineas a year, and that they had only obtained possession of it, after recovering judgment by default, in an action which they were compelled to bring against the trustees for the rent, and in which, as they alleged, the plaintiffs had an opportunity, if they had thought fit, of trying the validity of the will at law. Their answer also set forth at large the proceedings that had taken place in the prerogative court, and in the court of delegates, where the validity of the instrument, as a disposition of personal estate, had been long in litigation, and where it had been finally decided, by two successive judgments, that Eli Stott had died intestate as to his personal estate; and they relied on those proceedings, and on the result of an unsuccessful application afterwards made to the Lord Chancellor for a commission of review, as sufficiently establishing the in-

necessary, to assist in determining the intention. *Ib.* But where testamentary papers, very similar in form, and embracing the same general range of objects, still present such discrepancies, that one cannot amount to more than a partial revocation, or repetition of the rest, the prerogative court allows all of them to be proved, and leaves it to courts of equity to exercise their own judgment on the question of addition or substitution, whenever those courts are called upon to construe their effect for the purpose of determining the rights of legatees. Jackson *v.* Jackson, 2 Cox, 42; Hemming *v.* Gurrey, 2 S. & S. 311; 1 Bligh, N. S. 479. And if the *primâ facie* presumption in favour of accumulation is rebutted by internal evidence, drawn from a comparison of the language and contents of the instruments themselves, testimony becomes then, and not till then, admissible, either to fortify or overthrow the original presumption. Hurst *v.* Beach, 5 Madd 359—61.

validity of the will, and the rights of the defendant, Mrs Dew, as the testator's next of kin and heiress at law. They also stated, that the plaintiff Thomas Clark was a prisoner in the fleet for contempt of the court of chancery, in disobeying certain orders made in a cause in which he was a defendant and these defendants were plaintiffs, and that his brother, the other plaintiff, was abroad and out of the jurisdiction.

The other defendants, the devisees in trust, by their answer admitted, that the testator was, as they believed, of sound and disposing mind, memory, and understanding, and legally competent to make a will at the time when he executed the one in question.

Sir Charles Wetherell and Mr Roupell, for the motion.

This motion is founded on the admissions contained in the answer of the defendants, and may be regarded as almost a matter of course. It is admitted, that the testator died seised of real estate, and that the defendants Mr and Mrs Dew, are now in the receipt of the rents and profits of that estate. They say, indeed, although their co-defendants, the trustees, say directly the reverse, that they do not believe the testator was of sound mind at the time when the will was executed. But that is perfectly immaterial. Whether he was so or not, is not within the province of this court to determine; but will remain to be ascertained by the issue *devisavit vel non*, which must of necessity be directed. That has been the course which, ever since the case of Kerrich *v.* Bransby(*a*) in the house of lords, this court has uniformly followed in dealing with questions respecting the legality of wills disposing of real estate. Nor does a court of equity in any case take upon itself to cancel rights created by a will executed with all the solemnities required by the statute, without first giving to the parties claiming under it an opportunity of establishing its validity before a jury.

The sentence of the ecclesiastical court not only is not conclusive, but has really no application. That court has decided that the will is ineffectual as a testamentary disposition of personalty, but it has no jurisdiction to pronounce upon its validity as to real estate; and it is by no means impossible that in this, as in other instances(*b*), a jury, which is the only competent tribunal, may, when the evidence is thoroughly sifted on a *vivâ*

(*a*) 7 Bro. P. C. 437, Toml. ed. See also Bates *v.* Graves, 2 Ves. Jun. 287; Webb *v.* Claverden, 2 Atk. 424.

(*b*) "I know but one case where this variation of judgment has happened, and that was the case of Maxwell *v.* Lord Montague; there a testator was determined to be *compos mentis*, upon a suit in the ecclesiastical court, and that sentence was affirmed in the court of delegates: afterwards, on a trial at law in relation to the real estate devised by the will, the testator was found *non compos*, and then an application was made to the house of lords, by petition, to reverse the sentence in the court of delegates, in order to make the determination uniform; but the house of lords dismissed the petition, because the sentence of the delegates is decisive, and no appeal lies from it." Per lord Hardwicke C., 3 Atk. 546. In arguing the case of Hurst *v.* Dodgson, which was an application made to the Lord Chancellor in Dec. 1829, for a commission of review, Dr Lushington mentioned that a similar diversity of result had occurred in Ayrey *v.* Hill (reported in the ecclesiastical court in 2 Add. 206), where a will, impeached on the ground of the testator's insanity, was established as a valid testamentary disposition by the judgment of sir J. Nicholl, and was, on the same ground, determined to be inoperative as a devise of real estate, by the verdict of a jury. Dr Lushington added, that he recollected no case in which the converse had taken place,—in which a will, set aside by the spiritual court, had been held effectual on a trial at law.

voce cross-examination, come to a conclusion directly contrary to that of a judge, who founds his opinion upon written depositions. In the meantime, this will, which is admitted to have been duly executed according to the statute, gives the plaintiffs a *primâ facie* title ; and while the question of right is depending, they are entitled to have the property secured to abide the result of the trial.

The Solicitor-General and Mr Garratt, for the defendants, Mr and Mrs Dew.

Mr and Mrs Dew filed a bill some time ago in this court against the plaintiffs in the present suit, to compel them to account for the property which they had improperly possessed under the instrument now for the second time attempted to be set up ; and by an order pronounced in that cause, the Clarks were directed to make a transfer of certain sums of stock standing in their names in the bank. They have refused to obey the order, and one of them has since gone abroad. The other, the party moving, is a prisoner in the fleet under an attachment for contempt. Under these circumstances, the plaintiff has no right to be heard upon the present motion. The contempt, it will be said, was not committed in this suit ; but it was in a suit between the same parties, having reference to the same property, embracing precisely the same questions, and all depending on one and the same instrument. Here two parties, under different titles, assert a claim to real and personal estates, which a person professes to dispose of by a will. As to the former, the right, it is admitted, can be bound only by the finding of a jury ; but as to the latter, the proper tribunal has already decided against the validity of the only instrument upon which the plaintiffs' claim depends. Following up that decision, this court has made an order on the plaintiff to deliver up the property, and has sent him to the fleet on his refusing to comply. His disobedience is a gross and wilful contempt, amounting to a denial of the court's authority, and disqualifying him, so long as he persists in his obstinacy, from claiming its assistance either on the present or any other occasion.

The Lord Chancellor said, that the practice was the same, he apprehended, in equity as at law, that a party could not move, till he had cleared his contempt; but that the rule must be confined to proceedings in the same cause : otherwise the consequence would be, that a party, who was utterly unable to comply with an order of the court, might be prevented from afterwards prosecuting any claims, however just, against the person who had succeeded in obtaining that order. Here the suit was between the same parties, but it had reference to distinct properties.

For the defendants. The plaintiffs have no right to rely on the answer of the defendants, the trustees. It cannot be read as an affidavit ; for affidavits are not to be read on a motion for a receiver ; and it cannot now, as it could not, at the hearing, be admitted as evidence against their co-defendants, Mr and Mrs Dew, who have an opposite interest.

This court never interferes by appointing a receiver, unless it entertains a clear opinion, that, when the cause is brought to a hearing, a decree must be made in the plaintiffs' favour. But in this case the will has been already determined, by two consecutive judgments of the proper tribunals, to be inoperative by reason of the testator's incapacity ; and it is in the highest degree unlikely that an appeal to a jury upon that point will be attended with a different result. The defendants, the Dews, are now in

possession of the property, and as far as the litigation has hitherto proceeded, the plaintiffs have shown no probable title to dispossess them. On that ground alone, a similar application for a receiver was refused in the case of Cholmondeley *v.* Clinton. Were their prospects, however, far more encouraging than they are, the laches of the plaintiffs, who have suffered many years to elapse since their uncle's death, without asserting any right to this property, would be a sufficient answer to the motion. Had they been really anxious to try the validity of the will in a court of law, they might have come forward to defend the action for rent brought against the devisees in trust. Instead of that, they have allowed Mr and Mrs Dew to recover a judgment by default, and subsequently to levy a fine, upon which five years have run, so that their claim, if they ever had any, is now effectually barred.

The object of the motion is merely to harass the defendants, and, if possible, to drive them to a compromise. At the very moment when they come forward to make it, they retain in their hands, in defiance of the order of the court, 5000*l.* of stock to which Mrs Dew is rightfully entitled; and yet they now seek to deprive her of the possession of a small strip of ground, which, even if they had any title to it, would afford her a poor compensation for the large sums of hers which they have spent and can never repay, and for the property they unjustly withhold from her.

Sir C. Wetherell, in reply.

The Lord Chancellor. This is an application to the discretion of the court, which is called upon by the motion, to appoint a receiver, and dispossess the heir at law. Now it is clear from what appears in the answer, and from what is already known to the court, that the will, under which the plaintiff claims, is disputed: and the only question to be tried, in order to decide that point, is the sanity of the testator. That question, however, has been already fully investigated, as far as regards the personal estate; and though the result is not conclusive as to the property now claimed by the plaintiff, the contest lay between the same parties, and the result of those proceedings was such as to furnish no reasonable ground for believing that the plaintiff will succeed, when he brings the will before the proper tribunal on an issue at law. I would ask, besides, if the property is exposed to any danger in the mean time, while it remains in the possession of the defendants? The plaintiff is already bound to pay over a considerable sum to the defendants, under an order of this court; and so long at least as he retains that sum in his hands, he has a sufficient security for the rents and profits, should it ultimately appear that he is justly entitled. On both those grounds the motion must be refused, but without costs.

Sidden *v.* Lediard.

Russell and Mylne, 110.

In order to get rid of the effect of a disclaimer, a distinct application, supported by affidavits establishing a special case, is necessary.

Nov. 23, 1829.

ON the death of Thomas Lediard, who had been declared a trustee and

[Sidden *v.* Lediard.]

accounting party under the original decree, the suit was revived against Ann Lediard, his widow and personal representative: and she, by her answer and disclaimer, after denying assets of her testator, disclaimed all right, title, and interest in the trust property and effects in question in the cause. Afterwards, however, a supplemental bill was filed by the same plaintiffs against Ann Lediard and others, praying further declarations and relief with respect to the same trust; and by her answer to that bill, she insisted that she was entitled to receive and be paid what might be found due to her husband's estate, on taking the account of the said trust; and that she ought not to be bound by her former disclaimer, inasmuch as, at the time of filing the same, she was ignorant of the existence of many vouchers for payments made by her husband, as well as of other documents explanatory of the accounts given in by him relating to the trust property, which vouchers and documents had, as she alleged, been discovered at a subsequent period. The Master, by his report, among other things, stated, that as Ann Lediard had disclaimed all interest, and the plaintiffs had waived any account against her as the representative of T. Lediard, he had not thought proper to allow any charge against the said T. Lediard, or to proceed upon the discharge which his executrix had carried into the office.

When the cause came on for further directions, Mr Whitmarsh on behalf of Ann Lediard, applied for liberty to go in and prove her claims against the trust estate, notwithstanding the disclaimer she had filed. When that disclaimer was put in, she had no means of knowing how the account stood between her late husband and the plaintiffs: but they were well aware that a large balance was due to Mr Lediard for expenses incurred in the execution of the trust. They had therefore availed themselves of her disclaimer, and artfully abandoned their charge, in the hope of escaping from the payment of that balance. The subsequent discovery of a box of papers had first led the defendant to a knowledge of the truth. There was no affidavit in support of the application, but Mr Whitmarsh relied on the statement in Mrs Lediard's answer to the supplemental bill, and on the facts found by the Master's report, and he referred to a case of Branch *v.* Spursell(*a*) at the Rolls, where it was held that the defendant might insist upon a claim, notwithstanding he had put in a disclaimer.

The Lord Chancellor said, that, in order to get rid of the effect of a disclaimer, it was necessary to show some specific ground. Here the statements in the answer were too loose and general for the court to act upon. Mrs Lediard ought to have made a distinct application on the subject, supported by special affidavits, setting forth the facts in detail on which she founded her claim to such an indulgence.

(*a*) 1 Newl. Harr. 235; but in Seton *v.* Slade, 7 Ves. 265, lord Eldon held, that a defendant could not get rid of a disclaimer upon the record, without a strong case upon affidavit. As to a disclaimer by an accounting party, see 2 Russell, 462.

Ex parte Farrow, in re Adams.

Russell and Mylne, 112.

A committee of the person and estate of a lunatic appointed without a reference, where the property was small.
Dec. 8, 1829.

A PETITION was presented by the sister of a lunatic and her husband, praying that she might be appointed committee of the lunatic's person and estate. It appeared by affidavit that the lunatic's fortune consisted of a messuage of the yearly value of 25*l.*, of 350*l.* stock in the three per cents, and of household furniture and other effects, and debts due to him to the amount of about 90*l.* more.

Mr Chandless, who appeared in support of the petition, requested, that, to save expense, as the property was so small, the appointment might be made by the court in the first instance without a reference to the Master. That had been the course followed in Ex parte Pickard, 3 Ves. & B. 127, and in Ex parte Lacy, 1 Coll. 196.

The Lord Chancellor granted the application on the authority of the cases cited.

Anon.

Russell and Mylne, 113.

A committee should have the previous sanction of the court for not passing his accounts annually.
Dec. 15, 1829.

ON an application made by Mr Tinney, that the committee of a lunatic might have liberty to pass his accounts, which, in consequence, as was alleged, of the smallness of the property, had not been passed since the year 1823.

The Lord Chancellor granted leave in this case, but said, that whenever from any cause it is found inexpedient to pass the accounts of a lunatic's estate regularly, an application ought to be made, in the first instance, for liberty to dispense with the general rule, and the court would then exercise its discretion on the subject. Ex parte Pickard, 3 V. & B. 127.

Burkett *v.* Spray.

Russell and Mylne, 113.

Where a cestui que trust, having a life interest only, is declared entitled to his costs out of the trust property, the court will not give him a mere lien on it, to be enforced by subsequent proceedings, but will direct an immediate sale for the purpose of defraying them.
Decree varied on appeal in respect of costs only.
Nov. 27, 28, 1829.

THIS was a suit to carry into effect the trusts of a marriage settlement; and one principal question related to the proper construction of a clause, which had been held by the court below to empower the trustees, during the life of the tenant for life, to sell the furniture and other effects comprised in the settlement, and to invest the produce in stock upon the same trusts.

The cause now came on by way of appeal against so much of that decree as decided, that the trustees had a power of immediate sale, and that the tenant for life should not have his costs paid at once out of the fund by the trustees, but should have a lien for them on the property to be sold.

Mr Horne and Mr Tennant, for the appellant, the tenant for life.
Mr Pemberton and Mr Girdlestone, Jun., for the trustees.

The Lord Cahncellor, having expressed a clear opinion that the decree was right upon the first point, it was then argued on the question of costs.

On the one hand, it was contended, that the decree was erroneous, inasmuch as it decided that the appellant was entitled to his costs, but did not, as it should have done, provide for their payment by directing a portion of the property to be sold for that purpose. It declared his right to be reimbursed, and gave him a lien for the costs on the trust effects as against the remaindermen, till the trustees should make a sale; but it left him to recover them afterwards as he best could, possibly by an action at law. Such a direction was quite unprecedented, and was contrary to the principles of a court of equity, which always endeavoured to administer complete and final justice between the parties. Admitting that the rest of the decree must stand, this was not a mere appeal on the propriety of giving costs, for it related to the peculiar and inequitable mode in which they were directed to be charged and paid, so that it formed a substantive and not a consequential part of the decree against which relief was prayed, and it was therefore properly brought under review.

On the other side it was answered, that, assuming the decree to be right in other respects, this was substantially an appeal for costs, which, it was conceded, could never be entertained. Whether these costs were properly allowed or not, and whether they were duly provided for or not, it was impossible to pronounce without opening up the whole of the decree, which embraced a great variety of points, and against which there was no general petition of rehearing.

[Burkett *v.* Spray.]

The Lord Chancellor said, that an appeal would lie in respect of costs, if any principle were involved, and they were not merely given as consequential on the decree(*a*). The objection taken to the manner in which they were charged, appeared to him to be sound. The trustees and the appellant, the tenant for life, were entitled to have their costs paid immediately out of the *corpus* of the estate, without waiting to have them raised at a future period. The decree, therefore, ought to be varied to the extent of directing that the deficiency should be made good by an immediate sale.

Hodges *v.* Horsfall and others.

Russell and Mylne, 116.

Where an agreement expressly refers to a plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan. But unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused.

Dec. 8, 9, 16, 1829.

IN the year 1821, Samuel Hodges entered into a negotiation with William Horsfall, for the purpose of procuring a reversionary lease of a parcel of land with the buildings erected thereupon, of which Horsfall was the owner in fee. The premises were at that time subject to a lease, which was not to expire till Midsummer 1824. After some treaty, the parties respectively signed a written agreement, which was prepared by Horsfall's attorney, and which, as far as is material to the present question, was in the following words: "Memorandum of agreement made the 18th day of August 1821, between William Horsfall of, &c. of the one part, and Samuel Hodges of, &c. of the other part. William Horsfall does hereby agree for himself, his heirs, executors, administrators, and assigns, to grant a lease unto Samuel Hodges, his executors, administrators, or assigns, of all those premises at Battle Bridge, now in the occupation of ——— Younge, known by the sign of the Maidenhead public house, with the additions intended to be made thereto by Samuel Hodges as per plan agreed upon, for a term of thirty-one years from Midsummer 1824. The said Samuel Hodges agrees to pay to William Horsfall a premium of 1500*l.* sterling money for the grant of such lease, at 80*l.* per annum, the said rent to commence from the 25th day of June, which will be in the year of our Lord 1824; the rent to be paid quarterly on the usual days for payment of rent, the first payment to be made on the 29th day of September 1824." The agreement also contained provisoes for the insertion of the usual covenants in the lease, and a clause requiring that the additions should be made within twelve months after the lessee was let into

(*a*) So Jenour *v.* Jenour, 10 Ves. 572; Taylour *v.* Popham, 15 Ves. 78. Most of the cases on the subject of appeals relative to costs are brought together in a note to Mr Blunt's edition of Ambler's Reports, 521. To these may be added, Eyre *v.* Parnell, 29th Feb. 1727; Crosby *v.* Shadworth, 4th April 1728, D. P. Harc. MSS.; Gould *v.* Granger, Mos. 395; Huband *v.* Huband, 7 Bro. P. C. 433, Toml. edit.; Tod *v.* Tod, 1 Bligh, 638, N. S.; and see 1 Dow, 261.

[Hodges *v.* Horsfall and others.]

possession; and it further stipulated, that the whole premium of 1500*l.* should be paid by Michaelmas 1821.

Prior to this contract with Hodges, two other proposals had been made to Horsfall for a lease of the same premises, on behalf of persons of the names of Tester and Younge. The negotiations, which ensued upon the subject between them and Horsfall, were afterwards successively broken off; but in the course of them, certain plans were produced and shown by the latter, particularly specifying the additions and improvements, which he, as landlord, would expect an incoming tenant to execute. By all of these plans, special provision was made for bringing forward the front of the Maidenhead public house, so as to be in a line with three other houses which Horsfall had recently erected on the immediately adjoining plot of ground; but two of them differed considerably in their details. According to the first, denominated Testar's plan, from having been the one shown to Mr Testar, it was intended that the whole of the old buildings, together with the required additions, should compose a single tenement only. According to the other two, of which one was rather more ornamental than the other, but which were substantially the same, and were treated throughout the argument as forming one plan, and distinguished by the name of Younge's plan, it was proposed that the additions should be made in such a manner as to constitute, with the original building, two houses.

In the month of August 1821, immediately on signing the agreement before stated, Hodges paid into the hands of Horsfall the sum of 100*l.* as part of the stipulated premium; and, in the October following, Horsfall having caused a lease to be prepared, to which was annexed a copy of the plan called Testar's plan, tendered it for execution to Hodges, and at the same time made a demand upon him to pay up the balance of the consideration-money. Hodges, however, refused to execute the lease; and Horsfall thereupon commenced a suit for specific performance, alleging, that the plan for converting the old buildings, together with the proposed additions into one tenement, was the one specifically designated by the memorandum. In his defence, Hodges insisted, that, if any plan were particulaaly referred to, it was not Testar's but Younge's plan, according to which the premises, with the projected alterations, were to form two houses, and he offered to accept a lease on the footing of that plan. That cause came on to be heard on the 27th of January 1824, when Horsfall, having failed in his proof, the Vice-Chancellor decided, that there was no such agreement as the court could perform; and the suit was dismissed with costs.

The present bill was then filed by Hodges against the daughters and coheiresses at law of Horsfall, who had died in the meantime, and against certain other persons who had accepted a lease of the premises in question with notice of the plaintiff's claim. It set forth at large the facts already detailed, and the proceedings in the previous suit. It charged that the only plans shown to the plaintiff during the treaty, were the two which had been received from Younge, and that of those the least expensive and ornamental was the one particularly referred to and intended, though certain other trifling alterations which it specified, with respect to rounding off the west corner of the building, had also been verbally agreed upon: and it prayed a specific performance of the contract on the basis of that plan; or if the court should not be satisfied that Younge's was the plan agreed upon, it prayed in the alternative that the parties might be decreed

to execute a proper lease and counterpart on the footing of Testar's plan. On the 6th of June 1826, the cause came on to be heard before lord Gifford, then Master of the Rolls, who dismissed the bill with costs.

The plaintiff Hodges now appealed from that decree. The material parts of the evidence adduced in support of the appellant's case are stated in the judgment of the Lord Chancellor.

Mr Horne, Mr Pepys, Mr Beames, and Mr Wigram, for the appellant.

There is no dispute here as to the extent of the premises proposed to be demised: neither can the defendants be now heard to say, that this was not a final and binding agreement; since they or the party whom they represent, recognized it as such by filing a bill claiming to have it specifically executed. The payment made by the plaintiff likewise, though, according to the modern doctrine, it cannot be considered as a part performance, sufficiently shows what was his impression. The only remaining question is, what were the alterations which the agreement meant to require, and what was the plan there referred to: for if, as we allege, those alterations were particularly described in a plan or drawing upon paper, and if that plan can be identified with the plan mentioned in the memorandum, it becomes, in effect, incorporated with it, and every term of the contract, as the statute requires, is ascertained by an instrument in writing. That some drawing or delineation upon paper was particularly pointed at by the words, "as per plan agreed upon," will hardly be denied: both parties concur in that, and the phrase itself sufficiently shows it. But the doubt arises from the circumstance, that in the course of the different negotiations several plans were produced, and in order to clear up that doubt, we are compelled to resort to extrinsic evidence. Had the language of the reference been, "as per plan marked A," the difficulty would have vanished entirely. As it is, a larger body of evidence is necessary, because the words are general, and only go to establish the fact of a specific plan being in existence, without giving us any assistance in distinguishing the one particularly meant, from others with which it might be confounded. But in all these cases the principle is the same, viz. that, wherever the principal agreement refers to another paper, as a substantive part of the contract, parol evidence becomes immediately admissible for the purpose of showing what that particular paper is, and of thus connecting the two instruments. That doctrine was laid down by Lord Redesdale in Clinan *v.* Cooke, 1 Sch. & Lef. 32; and was recognized by Lord Eldon in Saunderson *v.* Jackson, 2 Bos. & Pull. 238. The same rule has always been acted upon in the cases of agreements established on the language of a written correspondence, where parol evidence is called in to identify and connect the different letters, and if the letters so connected sufficiently ascertain the material terms of the contract, the statute is held to be complied with. Western *v.* Russell, 3 V. & B. 187; Richards *v.* Porter, 6 B. & C. 437; Tawney *v.* Crowther, 3 B. C. C. 318 (see Ogilvie *v.* Foljambe, 3 Mer. 53), a case which, as to this point, has never been doubted, though lord Redesdale has censured it on other grounds. In every case of this kind, indeed, the single difficulty is to find out what are the particular papers referred to; and the difficulty, of course, increases in proportion as they are numerous; but that applies only to the proof, and does not vary the law. If it were otherwise, the defendant would merely have to manufacture half a dozen different papers, and then alleging the want of precision, which his own fraud had created, as a rea

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son for resisting the introduction of parol testimony, might bid defiance to any suit calling on him specifically to perform his contract. In short, all that is required, in order to let in the evidence, is, that the agreement should contain an express reference. In Clinan *v.* Cooke, and in Boydell *v.* Drummond, 11 East. 142 (the only case cited on the other side on the argument in the court below), there was no such reference. In the prior suit of Horsefall against Hodges, it appears from the decree that the depositions on the part of Horsfall were allowed to be read, to prove that Testar's plan was the one referred to, and, in the present cause, the plaintiff's depositions were admitted at the rolls to prove that it was Younge's. There can be no question, therefore, that, on the grounds both of principle and practice, the evidence now offered by the plaintiff for the purpose of identifying Younge's as the plan referred to by the agreement, must be received; and if it be received, it is conclusive in his favour. Lord Gifford was induced to dismiss the bill, not upon the merits, but from an idea which was strongly pressed on his mind by the defendant's counsel, that the dismissal in the former cause decided the point in the present. But that idea was plainly erroneous: the appellant had nothing to do as a defendant in the former suit, but to resist, as he did successfully, the claim set up by Horsfall for a lease on the basis of Testar's plan; and the decree dismissing the bill of Horsfall, could never prejudice the appellant's right to relief upon an entirely different case, which he might, afterwards as plaintiff, be able to establish on a bill of his own(*a*).

The Solicitor-General, Mr Roupell and Mr Koe, contrà.

Where an agreement particularly describes and points to a written document, or paper plan, previously existing, the link, which is necessary to connect them together, may undoubtedly be supplied by parol evidence. But no such case is now before the court. The words of reference here are not specific or descriptive. They import no more than that some plan, constituting an important term in the contract, had been finally arranged before the memorandum was signed; but they do not state, nor do they of necessity imply that it was a drawn or a paper plan. For any thing that appears, the alterations agreed upon might then and long afterwards be resting merely in the breast of the parties; and if so, the evidence would be clearly inadmissible. Weeks *v.* Maillardet, 14 East. 568. Even if there was a drawing in existence (as to which the agreement leaves us wholly in the dark), no clue or mark is given by which to trace and ascertain it; and considering the variety of plans which were talked of and produced in the progress of the treaty, the reference is altogether of too loose and general a character, to warrant us in resorting to the aid of testimony to supply the material defect in the written instrument. Brodie *v.* St Paul, 1 Ves. Jun. 326, and Mr Vesey's remarks on that case, 11 Ves. 553, note, 2 Sch. & Lef. 7. The authorities adverted to, in which parol testimony has been called in to connect and identify a series of letters, so as to make up from them a complete contract in writing, have no application. They are all cases where effect has been given to previously existing documents, by agreements distinctly referring to and embodying them; whereas, here there is nothing to indicate with certainty, that the particular plan intended was then delineated on paper; or to distinguish it, if it were, from twenty others, more or less dissimilar, and either expressed or understood, for which it might be easily mistaken.

(*a*) See Higginson *v.* Clowes, 15 Ves. 516, and Clowes *v.* Higginson, 1 V. & B. 524

But we are not left to conjecture, that the plan referred to as the one finally determined on, was not a drawing upon paper. That appears plainly from the plaintiff's own bill, where it is stated that Younge's was the plan intended, but that, "from the conversations that passed upon the subject at the time of signing the agreement, it was considered by all parties present that the plan was not material." Besides, though Younge's plan was to be the basis, it certainly did not specify the whole of the required additions, and, therefore, could not possibly be "the plan agreed upon:" for the bill goes on to state, that it was to be subject to some trifling alterations for the purpose of rounding off the west corner of the building. Passing by the insuperable objections opposed to this suit by the statute of frauds, and by the impossibility of now ascertaining the precise nature of these alterations, the very fact that they had been verbally arranged and rested in understanding only, proves, beyond a doubt, that the plan spoken of as the one agreed upon could be neither of the two, upon which the plaintiff founds his claim to specific performance, but something different from both. Whether the difference was greater or less, is quite immaterial. It is enough to have shown, that one term of the contract was not, at the time when the memorandum was signed, reduced to certainty upon paper.

If the evidence were admitted, however, the plaintiff would not better his situation: for the case which the evidence establishes is at variance with that made by his bill, and totally destructive of his equity. The bill alleges, that a lease was agreed to be granted to the plaintiff on the basis of Younge's plan, with the exception already adverted to. But what do the depositions of Willis and Warlters prove? Why that no specific plan was referred to in particular; that it was a matter of comparative indifference to the parties, and probably of subsequent arrangement, what plan was to be adopted; and that if any plan had been finally settled, it was only understood between themselves, and had never been delineated on paper. If there had been a plan definitively fixed and reduced to writing, there can be no doubt that, on the solicitor asking for it, at the time when the contract was signed, it would have been forthcoming, or at least have been described in such a manner as to prevent the possibility of mistake.

But, supposing that the evidence were admissible, and supposing that by its assistance the terms of this imperfect memorandum were completely and clearly explained, and that they were moreover sufficiently expressed in writing to satisfy the statute, it would still remain extremely doubtful whether the agreement is of such a kind as the court, in its discretion, will think proper to be enforced: for it is really in the nature of a building contract, as to which courts of equity, aware of the practical difficulties in which they are involved by interposing, generally prefer leaving the parties to their legal remedies. Flint *v.* Brandon, 8 Ves. 159(*a*).

Mr Horne, in reply, contended, that, as the defendants had read no evidence, although they had given no notice of their intention to use the depositions taken on their behalf in the previous cause of Horsfall *v.* Hodges, there was nothing now to show the existence of any other plan than Younge's. That was the one, therefore, to which of necessity the reference must apply, and according to which, as the evidence distinctly connected it with the memorandum, the decree for specific performance must be made. The objection, founded on the nature of the agreement,

(*a*) The authorities are collected in 3 Swanst. 437.

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was groundless; for the court had frequently enforced the execution of a building contract, and could easily do so in a case like the present, where the extent of the proposed additions, and the dimensions of the several parts, were all minutely and accurately laid down in a drawing upon paper.

Dec. 16.—The Lord Chancellor. Two points were made by the defendants in the argument. First, it was insisted that parol evidence was not admissible to prove what was the particular plan agreed upon; and, secondly, even if it could be admitted, still, that in this case, there was no sufficient evidence to show that Younge's was the plan intended, or that, in fact, there was ever any precise or definite plan agreed upon at all. As to the first point, I am of opinion, on the authority of all the cases, and especially the case in 1 Schoales and Lefroy, where lord Redesdale has considered the subject very fully, that, as the written agreement refers specifically to a plan, if there be parol evidence, clear and satisfactory, to identify the particular plan, that evidence may be properly admitted for the purpose of so identifying it.

Then the next question arises, whether there is sufficient evidence here to show what particular plan was agreed upon. This depends entirely on the testimony of two witnesses, Willis and Warlters. Willis in his deposition says, that, towards the end of July 1821, Hodges called on him with two plans (which have been in the argument called Younge's plans, and were substantially the same), containing the proposed alterations in the premises, which he showed to Willis; that Hodges stated, that a meeting with Horsfall on the subject of the plans was to take place in the early part of August, at which he requested Willis to attend, and he left with him the two plans. Willis accordingly attended at the meeting between Horsfall and the plaintiff, sometime early in the month of August. On that occasion Willis produced the two plans, which had been left with him by the plaintiff at the previous interview, observing to Horsfall, when he delivered them, that these, he understood, were the plans that were to guide Hodges in the intended additions to be made to the premises, and that the front of the messuage was to be brought forward so as to be in a line with the adjoining houses; an observation to which Horsfall assented. Willis also states, that, as the friend of Hodges, he suggested some other alterations, whereupon Horsfall remarked, that these or any other trifling alterations, which might be suggested by the friends of the plaintiff, should have his concurrence: "but as regarding the material alterations, that (laying his hand on one of the two plans), is the one I wish the plaintiff to abide by." Nothing further took place at this interview; no answer was made to that remark of Horsfall, either by Willis or by the plaintiff; and, looking to the evidence, it is impossible to say it has been satisfactorily established, that either of the two plans was finally agreed upon, as the precise and definite plan to be followed in executing the projected alterations. No meeting or conversation appears from the evidence to have taken place, subsequently to that interview, until the 18th of August, when the parties again met for the purpose of signing the agreement. Besides the two I have mentioned, another plan which has been called Testar's plan, and which is particularly adverted to in the prayer of the bill, appears to have been in existence, and known to the parties. According to the evidence of Warlters, Lythgoe, who was present at the signing of the agreement, and who acted as Horsfall's attorney in the

transaction, read over the agreement, and asked the parties whether they had any plan of the intended improvements and alterations, on which Horsfall said, "it is no matter, we understand each other; and the plaintiff thereupon added, "you only wish to have the ground covered to do away the nuisance," and Horsfall rejoined, "we shall have no difficulty about that, we understand each other," or words to that effect. But the witness Warlters says, that no plans were produced or shown at the meeting at which the agreement was signed. This evidence, so far from leading to the belief that the parties had some definite plan fixed upon, tends rather the other way, and would lead one to suppose, that the agreement upon that point was either not definitively settled, or that it was in the breast of the parties themselves. And if there be not sufficient, as I think there is not, in the evidence of Willis, to fix the precise nature of the plan agreed upon, the doubt will be strengthened, rather than removed, by the evidence of Warlters, as to the subsequent transaction.

On the whole, there is not enough in this case to satisfy my mind, that the parties had agreed upon either of those plans; the decision of the Master of the Rolls must therefore be affirmed, and with costs.

Scott *v.* Hanson.

Russell and Mylne, 128.

If land, generally reputed to be water meadow, is sold by the assignees of a bankrupt by the description of uncommonly rich water meadow, whereas in fact it is very imperfectly watered, this is not such a misrepresentation as will avoid the sale.

December 9, 11, 12, 1829.

THE bill was filed in the year 1813, to compel the specific performance of a contract entered into in the year 1810, by which the defendant had agreed to purchase from the assignees of a bankrupt a piece of copyhold land, forming part of the bankrupt's estate, and described, in the particulars of sale, as a lot consisting of fourteen acres of uncommonly rich water meadow. The Master, by his report dated in March 1824, found that the plaintiffs had not established a clear title to the premises as *water meadow*, but that in all other respects a good title had been shown. To this report cross exceptions were taken; and on the argument of those exceptions (reported in 1 Sim. 13), sir J. Leach, then Vice-Chancellor, ruled, that the plaintiffs were not bound to make out a title to the lands as perfect water meadow, and that there was no valid objection to the specific performance upon that ground; but being of opinion that a good title in other respects had not been made out, he gave the vendors liberty to go again before the Master, and tender further evidence on the subject.

The defendant appealed from that order.

Mr Knight and Mr Girdlestone, for the purchaser, stated, that there were two questions to be determined: first, whether the plaintiffs were bound to show that the description they had given of the lands was correct; and, secondly, whether, so long after the period of the contract, they had a right to further time for the purpose of making out their title.

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On the first point they referred to Norfolk *v.* Worthy, 1 Camph. 337 ; Stewart *v.* Alliston, 1 Mer. 26 ; Stapylton *v.* Scott, 16 Ves. 372 ; Jervoise *v.* Duke of Northumberland, 1 J. & W. 559.

On the second point it was insisted, that the vendors had suffered fourteen years to elapse between the date of the contract and the Master's report, without taking proper steps to complete their title : and it was very hard on the defendant, that, notwithstanding the lapse of time, and the great depreciation of land in the meanwhile, he should be still held strictly to his bargain, and be compelled to wait in suspense, in order to give the plaintiffs a further opportunity of patching a title, which all their industry might never be able to perfect. The bill ought to have been peremptorily dismissed.

The Solicitor-General and Mr Jacob, contrà, contended, that the defendant had himself to blame for any delay which had occurred, as he had thrown every possible difficulty in the way of the plaintiffs. The descriptive words obviously applied, not to the extent of the irrigation, but to the quality of the land ; but, if it had been otherwise, still they were merely the vague flourishes of the auctioneer, and could not relieve the purchaser from the necessity of inspecting the property for himself, and forming his own judgment : still less could they bind the vendors, who were assignees, and had nothing to do with sale personally. Such indefinite phrases were only relative, and ought to have put the purchaser on inquiry. Fenton *v.* Browne, 14 Ves. 144.

The Lord Chancellor expressed his concurrence in the opinon, that the epithet "uncommonly rich," was applicable to the quality of the land, and not of the irrigation. It was admitted on all hands, that two, out of the fourteen acres, were not meadow land, or capable of being watered ; but there was no evidence to show any fraud or intentional misrepresentation on the part of the vendors. The lands were sold, not by the bankrupt, but by his assignees ; and it did not appear they were apprised of the nature of the property. As to those two acres, therefore, the defect of quality would form a proper subject of compensation. With regard to the remaining twelve, he was of opinion, after a careful review of all the affidavits (which his lordship went through minutely), that, although this certainly did not seem to be the best water meadow in the district, and might even possibly, as one witness had sworn, be the worst, no reasonable doubt could be entertained as to its bearing the character of water meadow. To entitle it to that character, it was not necessary that there should be at all times the uncontrolled use and command of the water. As to the evidence of identity, the apparent discrepancy between the extent of the mill mead, as described in the court rolls, and the property now included in the contract, would perhaps be explained by supposing that a portion of the mill mead was freehold ; which might be a proper ground for sending it back to the Master for further inquiries. Under these circumstances, the judgment of the Vice-Chancellor on both points ought to be affirmed.

Fawcett *v.* Whitehouse.

Russell and Mylne, 132.

A person employed on behalf of himself and his copartners in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership.

Before the transaction was discovered, one of the partners withdrew; and subsequently another partner assigned a share in the stock and in his proportion of this claim to persons then admitted into the concern: Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared.

December 15, 17, 21, 1829.

MESSRS Knight and Co. were lessees for a long term under Hill and Hopkins, of certain lands and mineral property, with iron works and furnaces thereunto belonging, situate at Verteg, in the county of Monmouth, where they carried on extensive business as iron-masters for a number of years. Latterly, however, they had found the works to be unprofitable, and had in consequence discontinued their operations; and as the premises were subject to a heavy rent, they became anxious to relieve themselves from further liability by dissolving the company, and giving up or assigning their lease. With that view they set on foot a variety of negotiations with different persons, chiefly through the agency of Benjamin Whitehouse, whom they employed to look out for some enterprizing capitalists, who might take the property off their hands; and finally, in November 1818, they concluded an agreement (which was afterwards, on the 2d of February 1819, carried into effect by a formal deed), whereby, in consideration of the same yearly rents and covenants as were contained in their lease from Hill and Hopkins, they agreed to demise the lands, mines and other premises in that lease, together with certain contiguous freeholds of their own, unto William Fawcett, Charles Shand and the said B. Whitehouse, for a term of twenty-four years. Contemporaneously with this transaction a copartnership was formed between Fawcett, Shand and Whitehouse, for the purpose of working the mines, of which they obtained possession by virtue of their under-lease from Knight and Co.; and they accordingly continued in partnership as iron-masters, each holding an equal third share in the leasehold property and the stock, till the month of November 1820, when Shand withdrew from the concern, and assigned all his interest in the premises, together with his share in the business, to the two remaining partners, Fawcett and Whitehouse, who carried on the trade as before. In the course of the following year several other persons were introduced into the firm, and, on the 23d of October 1821, when, besides Fawcett and Whitehouse, it consisted of James Hunt, Henry Hunt, Kenrick and Priestley, a new deed of copartnership was executed, specifying the amount of capital advanced by the different partners, and declaring the shares, which, under the arrangement then made, they were each to be considered as holding in the stock and profits of the company. Shortly afterwards Whitehouse also became desirous to retire, and by an instrument, bearing date the 2d of February 1822, he released and assigned all his rights and interests under the lease and copart-

nership deed to the remaining partners, in consideration of a sum of 13,500*l.*

The bill, which was filed by Shand, as an original partner, and by Fawcett, J. Hunt, H. Hunt, Priestley and Kenrick, as the continuing partners, against B. Whitehouse, set forth these transactions in detail. It then went on to state, that some time after the retirement of Whitehouse from the firm, the plaintiffs had discovered, as the fact was, that immediately on the execution of the deed of the 2d of February 1819, the defendant had received from Knight and Co. the sum of 12,000*l.* It alleged that payment to have been made in pursuance of a previous agreement, whereby Knight and Co. had undertaken to accommodate Whitehouse with 12,000*l.* (at first in the form of a conditional loan, which was afterwards converted into an absolute gift), for the purpose, as was pretended, of enabling him to advance the capital required for the partnership into which he was then entering, but in reality by way of premium for his services in procuring responsible tenants for the premises, and thereby relieving the former lessees from their liabilities to Hill and Hopkins. It alleged that this agreement was studiously concealed by Whitehouse from the knowledge of his copartners, and that it was made at the very time he was engaged, on their behalf and his own, in negotiating the treaty for the under-lease, when it was his especial duty to obtain, as he frequently professed he had done, the most favourable terms for the new company. It charged that the plaintiffs Fawcett and Shand, in acceding to the terms of the under-lease, and in embarking with Whitehouse in the joint adventure, had been mainly influenced by his representations, and had relied with implicit confidence on his integrity and honour; that inasmuch as he had been confidentially employed for their common interest, he was not entitled to derive any private pecuniary benefit from the transaction, without communicating an equal share of it to them; that, by accepting the alleged bonus from Knight and Co., he had intercepted an advantage that must otherwise have accrued to the partnership, which had of course sustained a loss in the terms of the contract to an equal amount; that under these circumstances his receipt of the 12,000*l.* was, in equity, a fraud upon his partners; and that, as to two-thirds of that sum, he ought to be considered a trustee, who had received the money for their use.

The bill further alleged, that, doubts having arisen with respect to the rights acquired in this claim by the new partners under the deed of October 1821, the plaintiff Fawcett, by a subsequent instrument, declared the true intent of that deed to be, that the claim should vest in the continuing partners respectively in the same shares and proportions as the rest of the copartnership stock. The bill prayed a declaration that the defendant had received the 12,000*l.* on behalf of himself and the plaintiffs Shand and Fawcett equally, and that he was a trustee, as to one-third part of that sum, for Shand, and as to another third part for the other plaintiffs, or for the plaintiff Fawcett alone; and that the plaintiffs might be declared respectively entitled to receive the same from him accordingly.

The cause was heard on the 17th of December 1825, before sir J. Leach, then Vice-Chancellor, when his honour made a decree according to the prayer of the bill, and charged the defendant with interest at four per cent on two-thirds of the amount he had received, and directed him to pay the costs(*a*).

(*a*) See note (A) at the end of this case.

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The defendant appealed against that decree; the suit, having become abated by his death, was subsequently revived; and the rehearing was now prosecuted by his personal representatives.

The particular details of the case, and the substance of the evidence adduced in support of it, are given fully in the judgment of the Lord Chancellor.

The Solicitor-General and Mr Rolfe, for the plaintiffs, observed, that the principle, on which the equity of the case depended, was extremely clear, and had long been the settled law of the court, viz. that wherever a person is concerned in a transaction in the confidential relation of agent for another, he shall not be allowed to take advantage of his situation in order to obtain a personal benefit to himself; and that wherever he does obtain such a benefit, he shall account for it strictly to his employer. The case of Carter *v.* Horne, 1 Eq. Ab. 7, was one of the earliest, and the recent decision with respect to the Arigna Mining Company(*a*) one of the latest instances, in which the rule had been recognized. The cases, likewise, in which factors had been compelled in equity to refund their gains, when, by clandestinely acting in the double character of merchant and factor, they intercepted a portion of the profits due to their principals, were another illustration of the same rule; and many others might be mentioned less similar perhaps in their specific circumstances to the one before the court, but bearing a close analogy in point of principle(*b*). It was impossible to distinguish the present case from that of a man, who, when engaged in the capacity of agent for the purchase of an estate, contrives, by a private understanding with the vendor, to charge a higher price for it to his employer than the sum actually paid, and to put the difference in his own pocket. Could there be a doubt, that, if his conduct were discovered, he would be compelled, on a bill filed by his principal, to refund the money thus fraudulently obtained? If the real transaction were concealed from the purchaser, no allegation or even proof that the vendor intended the additional payment as a personal bounty to the agent would avail as a defence against such a bill. So neither would it avail here.

The general principles of the court with respect to the duty of trustees had always been rigorously applied to partnership transactions. Thus, if two or more individuals entered into a joint speculation, no one of them had a right to draw a secret advantage from the contract behind the back of his companions. Carter *v.* Horne. The same rule had been acted upon in these cases, where one partner, having obtained a renewal of a partnership lease in his own name, is held to be in equity a trustee for the rest(*c*). It was clear, that a partner was under the obligation of doing every thing that was done relating to the partnership, in such a manner as would best promote the common interests of the concern: and would it be pretended that it was more competent for him to gain a clandestine benefit of this kind, than to sell a portion of the joint property for his separate advantage?

The doctrine was founded on considerations of general policy, and was equally applicable, therefore, whether the gain of the trustee was or was not shown to have been attended with loss to the *cestui que trust:* of

(*a*) Hichens *v.* Congreve, in the note (B) at the end of this case.

(*b*) See, in particular, East India Company *v.* Henchman, 1 Ves. Jun. 287; S. C. 8 B. P. C. 85, Toml. edit.; East India Company *v.* Keighley, 4 Madd. 16; Burton *v.* Wookey, 6 Madd. 367.

(*c*) Featherstonehaugh *v.* Fenwick, 17 Ves. 298.

course, where it was obtained at the expense of the latter, the rule applied with peculiar force. That was undoubtedly the case here. Knight and Co. were in circumstances of great responsibility and embarrassment; in their anxiety to escape from their difficulties, they had in vain offered a sum of 26,000*l.* to their landlords to induce them to accept a surrender of the lease. Afterwards they were glad to throw in their own valuable freeholds as a free gift, to be added to the premises comprised in the proposed under-lease; and after all, the transaction still seemed so beneficial, that, to enable them to bring it to a definitive settlement, they thought it worth their while to purchase the secret services of the defendant by a bribe of 12,000*l.* It was clear, that, if the real situation of Knight and Co. had been communicated to Fawcett and Shand, as it was incumbent on Whitehouse to have done, they would either have broken off the treaty, or have concluded it on terms much more favourable for themselves. At all events, the partners might fairly have demanded, and would doubtless have received, the 12,000*l.* as a bonus for the acceptance of the lease. The bill only asked relief to that extent. It was the duty of Whitehouse, dealing as he did on behalf of himself, and of copartners who relied implicitly upon him, to secure for them the best terms that could be had: and if, by any underhand agreement, he placed himself in a position where his private interest was at variance with his public duty, (conduct which a court of equity(*a*) uniformly discountenanced), and he had not firmness to withstand the temptation, the consequences of his fraud must fall upon his own head, and not be charged upon his innocent partners.

Mr Horne and Mr Roupell, for the defendant, admitted, that the doctrines propounded on the other side, and the authorities relied on in support of them, were not to be controverted; but they insisted, that they were totally inapplicable to the present case. The nature of the transaction had been greatly misrepresented. What had been called by the harsh name of bribe was, in truth, nothing more than a loan promised by Knight and Co. without interest, in consideration of the exertions of Mr Whitehouse, in finding for them a substantial tenant, capable of paying the rent and keeping the premises in repair; and it had no reference whatever to these particular plaintiffs. There was no principle, either in morals or in equity, which forbade them to offer, or him to accept, such an accommodation. The subsequent conversion of the loan into a gift, at first conditional, though subsequently made absolute, could not alter the character of the transaction. It was the voluntary expression on their part of gratitude for his successful exertions; and it was intended to supply him with the means of joining a partnership, in which, without the aid of his skill and experience, Shand and Fawcett could not have embarked. If the money had been afterwards presented as an acknowledgment for the benefits derived from his mediation, his partners could have had no reason to complain, and surely the circumstance of its having been a matter of previous arrangement could not make any difference. It was a sum paid in the nature of commission for personal services rendered to Knight and Co., by which Shand and Fawcett, who were thereby induced to engage in a lucrative speculation, so far from being losers, were actually benefited. The formation of a responsible partnership, able and willing

(*a*) Burton *v.* Wookey, 6 Madd. 367, and the Vice-Chancellor's observations in Glassington *v.* Thwaites, 1 S. and S. 131—3.

to undertake the engagements of Knight and Co. to Hill and Hopkins, was the work of Mr Whitehouse alone; and to him, therefore, the reward exclusively belonged. In no possible view could it be shown to have deprived his partners of a single shilling.

It was a mistake to suppose that Mr Whitehouse had acted in a twofold capacity at the same time. He was employed as the agent of Knight and Co. till the partnership was formed, and no longer. Strictly speaking, he was never the agent of the partnership at all. The fact was, that, entertaining a favourable opinion of the project himself, he opened a correspondence with Mr Shand, and through him with Mr Fawcett; and that terminated in their accepting the proposals, which Knight and Co. had authorized him to make. Messrs Shand and Fawcett were perfectly content to close with him on the footing of the written proposals. They entered into the agreement with their eyes open; and not till after they had assured themselves by a careful inspection of the property, that the defendant's statements were correct. Thus far the defendant acted on behalf of Knight and Co.: whatever he did subsequently, was done as a member of the new concern; and from the moment he joined it, his best efforts were devoted to its interests. In settling the particular form and conditions of the lease, which was left principally, though not entirely, to his management (for his partners more than once insisted on alterations in which he reluctantly acquiesced), there was nothing to show that he did not, as he had represented, obtain the best terms that could be had. On the contrary, as his partners themselves superintended and revised the lease, as they had adopted instead of repudiating it, and did not now venture to impeach it on the ground of fraud, it was clear that his representations had been true. If it were a fraud, why were not Knight and Co. brought before the court, who, being participators in the benefit, were at least equally accountable? But the whole conduct of the plaintiffs showed that it was an honest transaction: the deed, constituting the partnership and conveying the property, was executed after great deliberation: it distinctly expressed what each party was to receive, and undertook to perform: they all professed themselves fully satisfied with it; and it was not competent for any of them, at this late period, to set up a claim inconsistent with its provisions.

The bill was defective in point of pleading; it was filed by persons, some of whom were no parties to the original transaction, and whose only title was derived from an assignment made to them by Fawcett. But a claim, such as this, founded on an alleged breach of trust to be established by a suit in equity, was not capable of assignment; for that would amount to champerty. There was no privity between Shand and the new partners, and they could not, as it was incumbent on co-plaintiffs to do, show they had a common interest in the subject of the suit. Cholmondeley *v.* Clinton, 2 J. & W. 135.

The Solicitor-General in reply.

Dec. 21.—The Lord Chancellor. From the importance of the question in point of amount, and also from the circumstances affecting, to a certain degree, the character of individuals concerned in the transaction, I thought it right, before I finally disposed of the case, to look minutely into the evidence, both on the one side and the other, adduced in the course of the cause.

The facts of the case were these: Messrs Hill and Co. were the lessees of mines and certain iron works in Wales, called the Verteg iron

[Fawcett *v.* Whitehouse.]

works. They underlet their interest to Knight and Co. for a long term, at a rent of 2600*l.* a year, and on condition that the premises should be kept in repair. About twenty-four years of that term remained unexpired. In consequence either of some difference among themselves or of some mismanagement, Messrs Knight and Co. discontinued the works. The works having remained unproductive for a period of five years, they were extremely desirous to get rid of the concern; so much so that they had offered the sum of 26,000*l.* or 28,000*l.* to Messrs Hill and Co. on condition that the latter would accept a surrender of the lease, which however they refused to do. Upon this refusal, they became desirous, if possible, either to assign the lease to some persons of respectability, who were competent to carry on the works, or in some shape or other to dispose of the concern. They had purchased freehold property contiguous to the mines, and of importance to them on account of the limestone it contained. They were willing, according to the evidence of Mr Hancock, on condition that any person would accept an assignment or underlease of the mine, to give up their whole interest in the freehold property; and, according to the evidence of another witness, they were willing, also, to make a considerable pecuniary sacrifice in addition to the surrender of the freehold property. They entered into a communication and correspondence with the defendant, who was well acquainted with transactions of this nature, and undertook to endeavour to procure persons of respectability and character to engage with him in this concern. On behalf of Knight and Co. the negotiation was conducted by Mr Hancock, one of the partners. In the month of October 1818, Mr Hancock wrote a letter, which has been principally relied upon on the part of the defendant, stating the terms on which Knight and Co. were disposed to part with the works. Those terms were to be an assignment of the lease, subject to the existing rents and covenants, and an absolute gift of the freehold property. Nothing more was stated in the letter which was addressed to Mr Whitehouse, who was to have the opportunity of using it, for the purpose of inducing other persons to embark with him in the adventure. In addition, however, to the terms mentioned in that letter, probably at the same period, though that does not very distinctly appear—certainly early in the progress of the negotiation—a particular advantage was stipulated for in favour of Mr Whitehouse, upon the nature of which a great deal will depend. The stipulation was, that, if the arrangement should be ultimately completed, and if Mr Whitehouse should succeed in procuring respectable persons to join him in the undertaking, Knight and Co. should advance to him the sum of 12,000*l.* without interest, half of which was to become his own property unconditionally at the end of seven or eight years, and the rest of it was to become his absolute property at the expiration of the term, provided that up to that period they had been indemnified by the partnership against the clauses in the lease granted by Hill and Co. In the event of any default, the re-payment was to be secured by a bond. When this arrangement was made by Mr Whitehouse, he, in the first instance, communicated the proposed terms to Messrs Jeavons, who refused, however, to accept them. Afterwards, a communication was made to Messrs Fawcett and Shand, and they eventually consented to engage in the concern with Mr Whitehouse. Before they finally decided, however, Mr Shand himself went into Wales for the purpose of inspecting the works; and as he did not rely entirely on his own judgment, application was made to a friend of the parties, Mr Jones Wilkin-

son, who was acquainted with business of that description, to accompany Mr Shand for that purpose. After having carefully inspected the premises, Mr Wilkinson and Mr Shand returned to Mr Fawcett, and the representations which they made as to the state of the works, and the nature of the property corresponded with the representations of Mr Whitehouse. Under these circumstances, Messrs Fawcett and Shand determined to engage in the undertaking. Accordingly, on the 30th of November, in the year 1818, they proceeded, with the view of concluding the agreement, to Birmingham. A few days previous to that time, Mr Whitehouse had instructed Mr Fellowes, who was his own private solicitor as well as his solicitor for the purpose of the partnership, to draw up the agreement relative to the stipulation as to the 12,000*l*. The agreement so drawn entirely got rid of the provision with respect to the bond, and converted what was said to be a loan, but was in fact a conditional advance, into an absolute gift. The agreement, in this shape, was delivered to Mr Whitehouse, who, on the day before the meeting at Birmingham, employed the son of Mr Fellowes to copy it, stating, as his reason for so doing, that he preferred employing young Mr Fellowes to employing a clerk of the house, because he wished the transaction to be kept secret. On the next day the parties met by appointment at the Royal Hotel at Birmingham. Previous to the meeting at the Royal Hotel, a meeting was held at the Swan Inn, not of the partners of the firm of Knight and Co., but of the other parties. Much conversation took place on that occasion: and in the course of that conversation, it is sworn by three witnesses who were present, that Mr Whitehouse stated to Messrs Fawcett and Shand, that he had done as much as he possibly could for them; and that Mr Fawcett or Mr Shand said in reply, he was satisfied Mr Whitehouse had done all he could for them, and that they wished him to finish the transaction, for they were wholly ignorant of mining concerns. They afterwards met at the Royal Hotel for the purpose of concluding the transaction. Some difference arose with respect to the terms of the agreement—as to whether it should be an assignment or an underlease; and Mr Shand and Mr Fawcett were willing so far to depart from the original arrangement as to agree that it should be an underlease, which Mr Whitehouse at first objected to; but he afterwards acquiesced in the alteration. As soon as the terms of this agreement were arranged, the defendant called three of the partners of the house of Knight and Co. out of the room, for the purpose of settling with them the terms of his own private agreement. The agreement, as drawn by Mr Fellowes, was handed to them. They objected to it as a departure from their original intention, which was, as it was stated, that the 12,000*l*. should be a loan, whereas it was now made an absolute gift. In consequence of the demur, some further negotiation ensued between the defendant and those members of the firm of Knight and Co. who were then present. On this point, the representation made by Whitehouse is material. He said, "I have procured you persons of respectability as partners in this concern; you run no risk; there is no chance whatever of the works being again thrown upon your hands; you ought, therefore, to release me from the bond, and not allow it to hang over my head." They acquiesced in these reasons. The stipulation relative to the bond was omitted, and the agreement was signed, with some alterations, as drawn by Mr Fellowes. It was then delivered into the hands of young Mr Fellowes, in order that he might get it stamped; and at that time the defendant stated his desire that he would show it to no liv-

ing soul; and he at the same time represented, over and over again to Mr Fellowes, that he would not sign the other agreement until this his particular and personal agreement had been previously executed.

Such are the facts of the case; and the first observation that occurs is, that in this transaction Mr W. was negotiating for himself and his future partners, as an agent for the intended partnership. That he was acting as their agent, the circumstances of the transaction show beyond the possibility of doubt. It is sworn to in express and distinct terms by Mr Hancock and Mr Wilkinson, and it is evidenced by the conversation already referred to, which passed at the Swan Inn. It is said, on the other side, that he could not be considered as absolutely the agent in the negotiation, but that Messrs Fawcett and Shand acted for themselves in the manner which they thought most calculated to promote their own interest. Mr Shand went himself to inspect the works, and he employed a friend, Mr Wilkinson, for the purpose of accompanying him in his survey: they did not, therefore, absolutely rely on the representations of Mr Whitehouse, but chose to have recourse to an agent of their own, in order to ascertain how far his statements were correct. Undoubtedly, that is the fact: they did not trust implicitly to the representations made by Mr Whitehouse with respect to the property and the nature of the works, and they deemed it prudent to apply to another person for the purpose of learning whether those representations were true. But Mr Wilkinson had nothing whatever to do with the treaty; the treaty was exclusively managed by Mr Whitehouse. It is said, also, that at the meeting at which the transaction was finally completed, the terms originally stipulated for by Mr Whitehouse were departed from,—and they certainly were departed from in one particular, in the adoption of an underlease instead of an assignment; and in that alteration, Messrs Shand and Fawcett unquestionably acted for themselves, and Mr Whitehouse acquiesced in it. But that does not in the least do away with the effect of this, that in all the arrangements with respect to the pecuniary terms and conditions, the business was conducted entirely by Mr Whitehouse, acting on behalf of Messrs Fawcett and Shand. If, therefore, Mr Whitehouse was placed in the situation of being the agent of two other persons, while he was acting also for himself, and he stipulated for a private advantage which was to be kept secret, and in which his co-partners were not to share, it is quite impossible for this court to sanction such a transaction; and the question therefore resolves itself into this, what was the effect of the private stipulation, and what the nature of the private advantage? We are not to be misled by terms; we must consider what the transaction really was. It is said this was a loan of 12,000*l.*, in order to enable Mr Whitehouse to bring his capital into the concern. But it was not a loan properly so called; it was 12,000*l.* advanced without interest, and to be repaid only in a certain event; being, in effect, a gift upon condition, liable to be defeated if the covenants in the other and principal agreement were not duly complied with, and being intended to secure the due performance of them. That such was the nature of the transaction, is evidenced by the subsequent conduct of the parties, because the moment the partners were known, the moment it was seen that no risk was to be run, that representation was made by Mr Whitehouse to the other parties: "You are perfectly secure; these are persons of responsibility and character; there is no danger of the works being again thrown on your hands, and therefore there is no reason why this bond should be allowed to hang over my head;" upon which they

consented to withdraw the stipulation relative to the bond, and converted that which before was a conditional into an absolute gift. But whether it was conditional or absolute does not vary the nature or substance of the case. If it was a conditional gift, still it was a benefit to this party, who was one of the three individuals who entered into the partnership, and who himself negotiated the terms of it. It is impossible for this court to sanction such a proceeding: when three persons are engaged in negotiating a partnership, and the negotiation is conducted by one as the agent of the other two, he should not, in my opinion, be allowed to make a private advantage for himself. That he felt it was an improper proceeding is proved by his anxiety to keep it secret from his partners; and it was not till after a considerable time had elapsed that it came to light.

It appears to me, therefore, upon these grounds, that the decision of the Vice-Chancellor was correct; and that as to two-thirds of the sum of 12,000*l.* the defendant must be considered a trustee for the partnership.

An objection was taken in point of form, that Hunt and the other new partners had been improperly joined as plaintiffs upon this record. When, however, the situation in which they stood is considered, that will appear to have been perfectly proper. Mr Fawcett and Mr Whitehouse had stipulated, when the new partners were admitted, that they should come into the concern entitled to all the advantages, and subject to all the conditions, of the original partnership. Whatever benefits the old partners had enjoyed, it was stipulated should be shared in by the new. This was one of the original benefits of the concern; and as it was conceived that that was not expressed with sufficient distinctness, a deed was afterwards executed, by which it was expressly provided that, as to the proportion to which he was entitled, Mr Fawcett should be a trustee for the Hunts, Kenrick, Priestley, and himself. I think, therefore, they had such an interest as rendered it proper they should be joined as plaintiffs.

Under these circumstances, I am of opinion that the decree of the Vice-Chancellor ought to be affirmed; and from the nature of the transaction, and the clearness of the evidence establishing its character, it ought to be affirmed with costs.

(A) The following passage, taken from the short-hand writer's note of the Vice-Chancellor's judgment in the preceding case, sums up the grounds on which his honour rested the decree; "It appearing upon the evidence that Whitehouse was in truth the person who originated the contract with Knight and Co. on the part of Fawcett and Shand, and it appearing also upon the evidence he represented, that he stood on so particular a footing of connexion with Knight and Co., that he could have obtained better terms from them than any stranger could; and that he further represented, on the day when the agreement between Knight and Co. and Fawcett, Shand and himself, was signed, that he had obtained *the best terms possible*, I am of opinion upon these grounds, and considering the situation in which he stood, that he was not at liberty to take to his own profit any part of that consideration which Knight and Co. were willing to pay to get rid of the business, but that he was bound to obtain the best terms possible for the intended partnership, consisting of Fawcett, Shand and himself, and that all he did obtain will be considered as if he had done his duty and had actually received the 12,000*l.* for the new partnership, as upon every equitable principle he was bound to do. I am of opinion, therefore, that this is what must be called in a court of equity a fraud on the part of the defendant. It was in fact selling his intended partners for 12,000*l.*; and when he received the money, Fawcett became entitled to one-third, and Shand became entitled to another third of it. Shand is now entitled to his 4000*l.*, and Fawcett having communicated his interest in the former partnership to four other persons, they with him are entitled to the other 4000*l.*"

[Fawcett *v.* Whitehouse.]

(B) Hichens *v.* Congreve.

This was a suit instituted by certain shareholders in the Anglesea Mining Company, on behalf of themselves and all other shareholders, except the defendants, against the chairman and acting directors of the company, and against certain other persons professionally connected with it. It appeared from the statement in the bill, that the company originated with sir William Congreve and two persons of the name of Clarke, by whose exertions chiefly it was organized; that it was established for the purpose of working certain mineral property in Ireland, represented to be of great value, and of which it was proposed that the company should purchase a lease; and that Congreve and the Clarkes, having been appointed to confidential and responsible situations in the management, took upon themselves to act for the common interests. The bill alleged, that in that capacity they were exclusively concerned on behalf of the company in negotiating the terms of the proposed purchase; that by a series of underhand contrivances, particularly set forth, they had succeeded in charging 25,000*l.* to the company as the consideration paid for the lease, although they had in fact obtained it from one Flattery, the owner, for the sum of 10,000*l.* only: and that the 15,000*l.* making up the difference had been received by the Clarkes, and been by them distributed in various proportions as a bonus among the several defendants. It charged that this distribution was made under such circumstances that all the defendants must, or at least on due inquiry might have known the source from which the funds were derived; that as the appropriation had never been sanctioned by the rest of the shareholders, but, on the contrary, had been studiously concealed from them, it was a gross fraud upon the partnership; and that the defendants ought, therefore, in equity to be regarded as trustees to the extent of the sums they had received. And it prayed they might be decreed to refund what they had so respectively received, and pay it in to the bankers of the company for the use of the proprietors at large.

To this bill a demurrer for want of equity was filed by two of the defendants, not directors, who had received sums, part of the 15,000*l.* as a bonus for their services to the directors of the company, in pursuance, as was alleged, of a previous agreement, and with a knowledge of the manner in which the money was procured. The Vice-Chancellor overruled the demurrer, and his order was on appeal confirmed by the Lord Chancellor on the 21st May 1828.

The answers of the defendants Congreve and the Clarkes set up in defence an alleged intermediate sale made to them on their private account, and before the company was in existence, for the sum of 10,000*l.* They insisted that 25,000*l.*, the price charged to the company, was no more than the property was worth; that as the original purchase had been made entirely at their own personal risk, the additional 15,000*l.* was a profit to which they were fairly entitled on the re-sale: and that the distribution of that sum was the result of a subsequent arrangement among themselves, by which they intended it once to stimulate and reward the exertions of the directors for the success of the new undertaking. They admitted, that in the conveyance, which was from Flattery directly to the company, no notice was taken of the intermediate contract, and that the full consideration of 25,000*l.* was expressed to be paid to him, although he received the sum of 10,000*l.* only: but this, they alleged, was done with his concurrence, merely to simplify the title, and without any intention of fraud or concealment, an intention which they positively denied. The answer of the Clarkes admitted that checks to the amount of 25,000*l.*, payable to Flattery or bearer, had been drawn on the company's bankers, and that the money due on those checks had been received by H. Clarke, who had paid him 10,000*l.* in cash and bank notes. The mode in which the remaining 15,000*l.* had been appropriated was particularly set forth; and it appeared that 2941*l.* had been retained by H. Clarke for himself, 1047*l.* had been paid to his brother J. Clarke, 2500*l.* to sir W. Congreve, and that the residue, after deducting sundry small disbursements, had been apportioned in sums of not less than 1000*l.* each among the other defendants.

On the 22d of May 1828, a motion was made on behalf of the plaintiffs, that the defendants, sir W. Congreve and the Clarkes, might be ordered to pay into court respectively such sums of money, part of the said 15,000*l.*, as appeared by their answers to be then in their hands.

Mr Horne, Mr Sugden, Mr W. Lee and Mr Pemberton, for the motion.

The Attorney-General, Mr Pepys and Mr Phillimore, for J. and H. Clarke.

Mr Twiss and Mr Loftus Lowndes, for sir W. Congreve.

The Vice-Chancellor made the order.

Dod *v.* Herring. Ex parte Herring.

Russell and Mylne, 153.

If the assignees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award.

Jan. 13, 1830.

THE defendants were ship-owners and merchants, who between the years 1818 and 1824 had been concerned with a person of the name of Thompson in several commercial adventures to the South American provinces. On the 22d of November 1827, before any final settlement of the accounts upon those adventures, Thompson became a bankrupt; and the plaintiffs, who were his assignees, filed the present bill to have the accounts taken, and the balance which they alleged to be due to the bankrupt's estate, ascertained and paid.

To this bill the defendants put in a plea of an award and judgment. The award was pronounced under an order of court made at the trial of an action brought by the defendants against the bankrupt in Hilary term 1826. The trial took place on the 23d of July 1827, when by consent a verdict was taken for the plaintiffs in the action for 10,000*l.* and 40*s.* costs, subject to the award of W. H. Maule, to whom all matters in difference between the parties were by the order referred. On the 26th of February 1828, the arbitrator made his award, whereby the sum found due to the defendants was reduced to 4242*l.*, and judgment as of Hilary term 1826 was thereupon entered up for that amount. The plea averred that all the accounts and mutual claims existing between the defendants and the bankrupt in respect of the dealings and transactions as to which discovery and relief were sought by the bill, were properly comprised within the terms of the reference, were fully and fairly brought before the arbitrator, and were finally adjudicated and determined by his award(*a*).

The defendants appealed from the judgment of the Vice-Chancellor overruling the plea, and they also presented a petition in bankruptcy (which was brought on at the same time), praying they might be at liberty to prove under the commission for the amount found due to them by the award and judgment. In addition to the facts set forth in the plea, the petition stated, that, at a meeting before the arbitrator on the 30th of November 1827, one Knight, as the attorney of the bankrupt, appeared and contended that the bankruptcy of Thompson annulled the submission, and that the arbitrator ought not to proceed, but the objection was overruled; that Knight then requested that the proceedings might stand over till assignees were chosen, that he might procure instructions from them, which was agreed to; that, after the choice of assignees, several further meetings were held before the arbitrator, all of which Knight attended; and that at some of them one of the assignees was present, together with the solicitor to the commission.

The question of law raised by the plea (which was admitted to be correct

(*a*) The averments of the plea are more fully stated by Mr Simons, who has reported the case before the Vice-Chancellor, 3 Sim. 143.

in point of form) was argued very fully by the Solicitor-General, Mr Bickersteth and Mr Hall, for the plea; and by Mr Rose and Mr Wakefield, for the plaintiffs. Besides the cases cited in the court below, Cooper *v.* Johnson, 2 B. and A. 394, was referred to.

But as the Lord Chancellor's judgment proceeded upon a different ground, it has been thought unnecessary to insert a note of this argument.

At the close of the argument on the law, evidence was read establishing the allegations of the petition. It did not appear, however, that the assignee who attended before the arbitrator, took any part in the proceedings.

The Lord Chancellor said, that, if the assignees had authority in law to adopt the submission, and it seemed to be conceded that they had, as it was clear that they or one of them had gone to the meetings before the arbitrator, and when present had made no objections to the proceedings, he had a right to assume, as a jury would assume, that they did adopt them. He should, therefore, make the order prayed by the petition. His decision upon the plea became then a matter of form, merely affecting the costs; but as the point which it raised was important, and embraced a variety of considerations, he should take some time to consider of it.

Judgment upon the plea had not been given at the time when his lordship resigned the great seal.

Burch *v.* Rich.

Russell and Mylne, 156.

IF a bill, after being filed, is then amended, it is irregular to put it again upon the file without a fresh signature to the draft, although the amendments have only reduced it to the shape in which it was originally drawn and signed by counsel(*a*).

Jan. 18, 1830.

Sheriff *v.* Coates.

Russell and Mylne, 159.

Equitable jurisdiction upon the 34 Geo. 3. c. 23, is not excluded by the special remedy thereby provided. Independent of that remedy, the statute vests in the inventor a right of property which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established.

In this case the evidence as to title not being conclusive, the injunction was dissolved, and an issue directed, the defendants keeping an account.

The court will, itself, compare and decide upon alleged piracies by inspection, where that can be easily and safely done.

Jan. 18, 21, 22, 1830.

(*a*) French *v.* Deare, 5 Ves. 547; Pitt *v.* Macklew, 1 S. and S. 136, n.; Attorney-General *v.* Fellows, 1 J. and W. 254; Webster *v.* Threlfall, 1 S. and S. 135.

[Sheriff *v.* Coates.]

THIS was a motion to dissolve an injunction (originally granted ex parte) to restrain the defendants from using certain patterns employed in the printing of cotton goods, and from vending the goods so printed, the plaintiffs claiming an exclusive property in the patterns under the provisions of the calico printers' acts. By the first of these acts, 27 Geo. 3. c. 38, s. 1, which recites, that "it may be expedient for the encouragement of the arts of designing original patterns for printing linens, calicoes, cottons, and muslins, to vest the property thereof in the designers, printers, or proprietors for a limited time," it is for that purpose enacted, "that from and after the 1st of June 1787, every person who shall invent, design, and print, or cause to be invented, designed, and printed, and become the proprietor of any new and original pattern or patterns for printing linens, cottons, calicoes, or muslins, shall have the sole right and liberty of printing and reprinting the same for the term of two months, to commence from the day of the first publishing thereof, which shall be truly printed with the name of the printer or proprietors at each end of every such piece of linen, cotton, calico, or muslin; and that if any calico-printer, linen-draper, or other person whatsoever, from and after the 1st of June 1787, within the time limited by this act, shall print, work, or copy such original pattern or patterns, or cause to be printed or reprinted any such pattern or patterns, or shall print or reprint, or cause to be printed or reprinted, any such pattern or patterns, and shall publish, sell, or expose to sale, or in any other manner dispose of, or cause to be published, sold, or exposed to sale, or in any other manner disposed of, any linen, cotton, calico, or muslin so printed, without the consent of the proprietor or proprietors thereof, first had and obtained in writing, signed by him or them respectively, in the presence of two or more credible witnesses, knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors of such pattern, then every such proprietor or proprietors shall and may, if the offence be committed in England, by and in a special action upon the case, to be brought against the person or persons so offending, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with costs of suit," &c. This act was at first temporary, but it was renewed by the 29 Geo. 3. c. 19, and finally declared perpetual by the 34 Geo. 3. c. 23, which, reciting that the first act had by experience been found to be beneficial, re-enacts its provisions, and extends the term of the exclusive privilege from two to three months.

The bill stated that the plaintiffs were the original inventors and the owners of the patterns in question, and had fully complied with all the provisions required by the statute in order to invest them with the right of property. The defendants were Coates, a calico-printer of Manchester, who was charged with having copied and pirated the patterns shortly after their publication,—Glover, who was Coates's agent and consignee in London, and who it was alleged had been concerned in the piracy, and had received and sold goods printed according to the pirated patterns,—and Leaf, who had purchased from Glover, and was re-selling large quantities of such goods, with a full knowledge, as it was charged, that they had been copied or pirated from the plaintiffs.

The motion, which had been made without success before the Vice-Chancellor upon affidavits, was now renewed before the Lord Chancellor on the coming in of the answers.

[Sheriff *v.* Coates.]

Sir Charless Wetherell, Mr Knight and Mr K. Parker, for the motion.

A patent for so short a period as ninety days is a singular and most inconvenient subject for the cumbrous and dilatory machinery of Chancery to deal with. Long before the question of right, which depends on a number of other intricate questions of fact and law, could be discussed and determined, the exclusive privilege would have expired by lapse of time, and the court would be left to grapple with a shadow. The equitable interposition by injunction, which is always discretionary, would be peculiarly dangerous here, and might work grievous injustice; for the malice of a rival manufacturer, by getting up a plausible ex parte case, might be able to crush the invention of an ingenious artist, and rob him of his just reward; and before the truth could be discovered and the restriction withdrawn, the public taste might have taken a new direction, and compensation would then be impossible. This ephemeral species of monopoly is suited to the fluctuating nature of fashion, to which the prints owe their short-lived popularity and value; and when the legislature thought fit to encourage them by securing to the inventor an exclusive privilege, it also pointed out an appropriate and summary remedy against infringement. The remedy, by a special action on the case, was given, because an injunction would have been absurd. Such an injunction, indeed, was never heard of. Although the statute has existed nearly half a century, this is the first time a court of equity has been summoned to assist in establishing a right under it, and even at law it has seldom or never been enforced(*a*); a circumstance which of itself should be a reason for declining to interfere now.

Upon the sound construction of the calico-printers' act, no right of property is vested in the inventor, and if so, there can be no jurisdiction. That act is framed very differently from the analogous statutes on which the copyright of authors and engravers(*b*) is founded; all of which, in distinct terms, confer or recognize the property independent of the penalties or forfeitures given to protect it: they first create the exclusive privilege; then, in a separate section, they declare that the pirated books and engravings, as well as the plates, shall be liable to be seized and destroyed; and finally, they declare a general right of action or suit in the proprietor against the pirate. Here, however, there is nothing of the kind. As the privilege, whatever be its nature, has no existence at common law, any more than ordinary copyright(*c*), it must be strictly measured by the words creating it, which form together one entire and connected clause, and bestow on the inventor one particular species of right and no other; that, namely, of proceeding against parties infringing by a special action on the case. As to the defendant Leaf, the statute clearly cannot apply; for he is sought to be charged simply as a vendor of goods, knowing the patterns to be pirated; which, supposing the fact of knowledge could ever be made out, would not be enough. It is not alleged that he was himself guilty of piracy by printing or reprinting those patterns, although, as the two members of the sentence are in the conjunctive,—"if any person shall print or copy such original pattern, or shall print or reprint, or cause to be reprinted, any such pattern, *and* shall publish, sell, &c., knowing the same to be printed, without the consent," &c.,—the two circumstances of printing or reprinting from an original pattern, and of publication with know-

(*a*) But see Mackmurdo *v.* Smith, 7 T. R. 518.
(*b*) 8 Ann, c. 19; 54 Geo. 3. c. 156.
(*c*) Millar *v.* Taylor, 4 Burr. 2303.

ledge, must concur, in order to bring him within the scope of the enactment. Against the other defendants the statute expressly prescribes a particular mode of obtaining relief, to which the plaintiffs ought to have resorted; and that by implication excludes every other. Parry *v.* Owen, 3 Atk. 740; and the *dictum* of sir A. Hart, in 1 Sim. 499.

The Lord Chancellor said, that in his opinion the jurisdiction of equity was not excluded by the operation of this clause.

For the motion. Upon the whole, the plaintiffs should be left to bring their action, and if they fail, as they must, against Leaf upon the statute, and against the others upon the evidence, their title to come here will be completely negatived. In the mean time the injunction should be dissolved; for there can be no pretence of long enjoyment and possession by the plaintiffs; and the evidence as to originality is conflicting. Hill *v.* Thompson, 3 Mer. 622. A bare inspection will satisfy the court that a great part, if not the whole, of the designs in these supposed original patterns is as old as the manufacture itself, and therefore incapable of appropriation: on that ground also the plaintiffs should be left to their legal remedy. Baily *v.* Taylor, 1 Russ. & My. 73.

[It was then agreed that, as the right to several patterns was in contest, the evidence of piracy in one or two only should be gone into, and that the other cases should follow the judgment in the first.

The Lord Chancellor observed, that as this was a case capable of inspection, the court would exercise a *primâ facie* judgment upon it without referring the question, as was usually done, to the Master.

Some of the patterns were accordingly handed up to his lordship, and were pronounced to be very much alike: some slight differences were also pointed out. The designs were extremely minute, and consisted of waving or dotted lines, with a leaf upon a uniform ground. The answers denied that they were new, or invented by the plaintiffs.]

The Solicitor-General, Mr Burge and Mr Wray, for the plaintiffs.

Admitting that there is a conflict of evidence, we are ready to take an issue on the point of novelty, provided the injunction is allowed to stand. No remedy is so easy and expeditious in a case of this kind as injunction. The bill may be filed and the order obtained one morning, and you may come the next, or as soon as the affidavits are prepared, to have it dissolved. The objection that the transitory nature of the right renders it an improper subject for equitable jurisdiction, applies much more strongly to the courts of law, where the delay would be infinitely greater, and the remedy, when obtained, exceedingly imperfect, being retrospective only, and not, like the remedy here, prospective also. Our object is not so much to recover damages for the loss we may have sustained by the piracy, as to vindicate and establish our right in future. The pirated patterns are very numerous, and to bring actions for the penalties on them all would be troublesome and expensive. In proceeding under the statute, besides, technical difficulties might occur, which would render the resort to law a very hazardous experiment. If the construction contended for be correct, we should certainly be nonsuited in an action against Leaf; and it is quite possible that we might fail in actions under the statute against all the three defendants, and yet, as having the undoubted right

of property, be entitled to call for the protection of this court. Our title to relief against all the parties is founded upon two simple facts—the originality of our patterns and the imitation by the defendants,—facts which can only be properly tried by issues directed out of Chancery. For these reasons, we have rather chosen to pass by our common-law remedy and come at once here. If we have a property in the patterns, that course was unquestionably open to us. The additional redress by a special action on the case cannot, nor was it intended to take away the remedy inherent in the right of property which we claim: we can be no worse off than if the statutory relief had not been granted. Equity frequently interferes, and that is its peculiar province, to recognize and protect a right for which no action is maintainable at all; for example, in waste.

The only remaining question is as to the existence of a property in these designs. An attempt has been made to argue that the right of property and of action are in the statute so intimately blended as to be incapable of subsisting separately: but that is a perversion of the act. To say nothing of the preamble, which is express, the words at the beginning of the enacting part are as strong as possible,—"that every person who shall invent patterns, &c. shall have the sole right of printing and reprinting the same," which is almost in terms the language used in the copyright and engravers' acts; and they have always been admitted to confer a property in the works, independent of the remedies given by the subsequent provisions. Beckford *v.* Hood, 7 T. R. 620. The remedies afforded by those acts by means of forfeitures and penalties can make no possible difference as to the right created by the previous section. Here the enactment is much shorter, being all compressed into one section, but it consists of two distinct and easily separable clauses. Under the first, which confers the property, the inventors may come here to prevent the manufacture of any goods of pirated patterns, whether they are sold or not, within the statutable period; whereas under the second there must be a publication and sale, as well as piracy, in order to found the right of action. And yet, unless there is protection against both, the object of parliament in encouraging the invention would be in a great degree frustrated, for otherwise the goods might be got ready within the three months, and poured into the market the moment the period had elapsed(*a*).

(*a*) Crossley *v.* Beverley. Crossley *v.* Derby Gas Light Company.

Injunction granted generally to restrain the sale, both before and after the term limited by the patent, of machines piratically manufactured while the patent was in force.
Dec. 4, 1829.

THE plaintiff was the assignee of a patent granted in 1815, for the manufacture of gas-meters of a peculiar construction, and had recently succeeded in establishing his right by recovering a verdict at law. The patent was to expire in the course of a few days.

The Solicitor-General and Mr Cooper moved ex parte, on the bill, which was verified by affidavits proving the infringement, that the defendants might be restrained from selling or disposing of any of the gas-meters in question which had been piratically made during the continuance of the patent. The defendant, it was suggested, had a large stock of the pirated articles on hand ready to be thrown into the market as soon as the monopoly was at an end; which they had no right to do to the detriment of the plaintiff, who had the exclusive privilege of manufacturing them during the fourteen years.

The Lord Chancellor granted the injunction.

[Sheriff *v.* Coates.]

An injunction is often granted independent of the right to an account, which here is comparatively a matter of indifference: and although the legal title may appear doubtful, the court will continue it, when once granted, till the hearing, wherever the mischief arising from infringement, as in a patent like the present, would be irremediable. University of Oxford *v.* Richardson, 6 Ves. 689. That part of the designs of these patterns has been long known is no objection, provided the rest be original. Hogg *v.* Kirby, 8 Ves. 215.

Sir Charles Wetherill, in reply.

The Lord Chancellor, after reading the preamble of the 27 Geo. 3. c. 38, and the enacting part of the statute, proceeded as follows: It does not appear to me that the provisions by which a remedy is given by the act, for infringement of the right, takes away the jurisdiction of this court. That jurisdiction is in my opinion founded on the first part of the clause, which gives the right of property; and which I consider to be a substantive and independent part of the act. It was said that the court ought not to interfere, on account of the small value of the property in litigation. It is true, that as to the particular pieces of calico, or possibly as to the individual pattern, it may not be of much value. But considering this as a general question, and as one affecting the manufacture, the subject is one of great value and importance, and entitled to the protection of the court; and there is no reason why, if the right of property is violated by piratical imitation, this court should not interfere.

In this case there seem to be two questions, first, as to there being a piratical imitation; and, secondly, as to the originality of the pattern. As to the first, I entertain very little, if any doubt. It appears that, after the original was drawn and printed, a specimen of it was sent to Coates through the medium of Glover, and Coates, after he had seen this specimen, drew the pattern which is supposed to be the imitation. That pattern has been produced to the court, and, on inspection and comparison of it with the other, I can perceive no difference, or a difference so slight, as to be colourable only. Secondly, as to the originality, it is essentially necessary that the party applying for equitable interposition should establish the originality of the pattern in a court of law. Here it is, at all events, impossible to come to any satisfactory conclusion upon that subject, since, from the difficulty of sifting the evidence, and the want of a power to cross-examine the witnesses, I feel myself wholly incompetent to pronounce whether this is or is not an original pattern. The only remaining question is, whether that point will be best determined by an action or an issue? My original impression was in favour of the former; but in this case it becomes an important consideration, that, from the language of the statute, the question cannot be properly tried in one action. An action cannot be maintained against Coates, Leaf and Glover. To try it properly there must have been at least two actions: one against Coates the printer, and another against Leaf and Glover the vendors with knowledge. But here the question of originality may be tried in the shape of an issue, giving the party also the opportunity if he chooses, and thinks it worth his while, of trying the question of piratical imitation in a second issue. In the mean time I shall direct the injunction to be dissolved, and the parties to keep an account of the profits of their sales. For it may turn out, on the investigation at law, that the pattern is not original; and the property might be destroyed by continuing the injunction till the result of the trial.

As to the other cases, I think I ought to dispose of them in the same way: for though the evidence in one of them is certainly stronger against the claim of originality, yet, as there was no opportunity to cross-examine the witnesses, I cannot satisfactorily decide, without sending the question to law.

Lushington *v.* Sewell.

Russell and Mylne, 169.

A testator by will gives his moiety of an estate called H. to his sister and her children, and subsequently by a codicil which purports to give them the whole of that estate if he shall possess it at his death, charges it with a sum of money to legatees: at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other: although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and equity will make no apportionment.

January 29, 1830.

M. G. LEWIS, by his will bearing date the 5th of June 1812, gave and devised all his real and personal estate to certain trustees upon trust, as to one moiety, for his sister lady Lushington, for her separate use for life, and after her decease, for all the children of lady Lushington who should be then living, as tenants in common, and their heirs, executors, administrators, and assigns; and as to the other moiety, he gave and devised the same, upon similar trusts, for his sister Mrs Sheddon and her children.

The testator afterwards executed a codicil without date, which, after making some observations with respect to his will and the nature and amount of his property, and the best mode of discharging his debts and legacies, contained this passage: "It is my intention that my estates which I have bequeathed to my sisters should not be divided equally between them, but in proportion to the number of their children at the time of my decease."

Another codicil, bearing date the 1st of November 1815, was in these words: "To prevent disputes, I leave to my eldest sister lady Lushington and her heirs my estate of Cornwall in Jamaica, and to my youngest sister, Mrs John Sheddon and her heirs, I leave my property in the estate of Hordley in Jamaica, the numbers of their respective children nearly equalizing the value of the two properties."

A third codicil, bearing date the 20th of August 1816, gave a variety of directions for the management of the testator's West India property, and for the treatment of the negroes belonging to it. It also imposed on the devisees of the Cornwall estate certain conditions, requiring them to reside periodically in Jamaica. It then continued as follows:—"I have bequeathed my estate of Cornwall to my eldest sister and to her children after her death. If no one of these persons will accept it on the above conditions, or neglect to fulfil it after acceptance, then I declare the estate to be forfeited to my youngest sister and to her children after her death, upon the same conditions. If no one of these persons also will fulfil this condition, then I declare the estate to be forfeited to that one of my next

heirs who shall be willing to perform it, to be forfeited by him or her also upon non-performance. I bequeath my estate of Hordley to my youngest sister, and to her children after her death, upon exactly the same condition of passing three months in Jamaica once in every three years, which I have above imposed respecting Cornwall. And if no one of these persons performs this condition, then I declare Hordley to be forfeited to my eldest sister, and to her children after her death, upon the same conditions, and if those conditions are not fulfilled, then Hordley (as well as Cornwall) shall pass to my next legal heir who will perform them. Whether I possess the whole or only the half of Hordley at the time of my death, I declare that the more or less shall make no difference. In that case I bequeath the whole of Hordley to my youngest sister, and to her children after her death, but I charge it with 15,000*l.* to be equally divided between the children of my eldest sister, to which purpose one half of the clear profits of Hordley shall be devoted till the whole 15,000*l.* shall have been discharged."

At the time when these several instruments were executed, the testator was the owner in fee of the Cornwall estate in Jamaica, and also of one moiety of the Hordley estate in the same island. At a subsequent period, in the month of October 1817, he entered into a contract for the purchase of the other moiety of the Hordley estate at the price of 32,000*l.* : and on the 10th of May 1818, before the conveyance of that moiety had been completed, he died, leaving his sisters lady Lushington and Mrs Sheddon, his co-heiresses at law, the former with ten, the latter with five children, then living.

The facts of the case, and the different testamentary papers of Mr Lewis, are stated more at large in the report of the cause on farther directions before sir A. Hart, then Vice-Chancellor. 1 Sim. 435. The will of the 5th of June 1812, and the codicils of the 1st of November 1815, and of the 20th of August 1816, had been declared well proved at the original hearing. Mrs Sheddon died soon after the institution of the suit. The decree made upon farther directions (among other things) declared, that the moiety of the Hordley estate, whereof the testator was seised at the time of making his last codicil, passed by the will and codicils to the children of Mrs Sheddon, and was charged with the sum of 15,000*l.* for the benefit of the children of lady Lushington living at the testator's decease ; and that the freehold of the moiety of the Hordley estate, purchased by the testator after the making of his last codicil, descended to his sisters, as his co-heiresses at law(*a*).

The children of Mrs Sheddon appealed against so much of that decree

(*a*) In pronouncing his judgment in court, the question as to the charge of the 15,000*l.* on Hordley, though raised in the argument (1 Sim. 464), appears to have been overlooked by his honour. But he referred to it particularly in the written judgment which he afterwards sent over from Ireland, and in conformity with which the decree was drawn up. His reference was in these terms :—"Mrs Sheddon and her children take the moiety of the Hordley estate which the testator was seised of at the time of making his will. The testator contemplated the acquisition of the other moiety, and with a view to equalize the sisters, he has charged the sum of 15,000*l.* on his Hordley estate, whether more or less. The will can have no operation on the moiety subsequently acquired, and his original moiety must bear the charge. I must therefore declare, that the moiety of the Hordley estate which the testator devised for the benefit of his sister Mrs Sheddon, and her children, now belongs to the children of Mrs Sheddon, subject to the payment of 15,000*l.* to the children of lady Lushington."

as charged the devised moiety of the Hordley estate with the legacy of 15,000*l.* for the children of lady Lushington.

Mr Horne and Mr Burge, for the appellants.

Mr Pemberton, Mr Lovat and Mr Preston, for the respondents, the children of lady Lushington, referred to Thellusson *v.* Woodford, 1 Dow's P. C. 249(*a*); Sheddon *v.* Goodrich, 8 Ves. 481; Buckeridge *v.* Ingram, 2 Ves. Jun. 652(*b*).

The Solicitor-General, for lady Lushington.

Mr Horne, in reply.

The Lord Chancellor. I have heard the argument to the close, on account of the amount of the property at stake, but I see no reason to differ from the opinion I threw out in the course of the argument, and which is in conformity with that expressed by the present Lord Chancellor of Ireland. The question is as to the effect of the subsequent codicil. The testator, at the time when the will and first codicil were made, was in possession of one moiety of the Hordley estate: and he devised it by the first codicil to his younger sister and her children. At the time when the second codicil, upon which the present question turns, was executed, it was contemplated that he might be in possession of the other moiety of the Hordley estate; and the codicil was accordingly framed with that view. The words of the codicil are these,—"Whether I possess the whole or only half of Hordley at the time of my death; I declare that the more or less shall make no difference. In that case" that is, in case I am proprietor of Hordley at my decease, an event which has happened, "I bequeath the whole of Hordley to my younger sister, and to her children after her death. But I charge it," that is, the whole of Hordley "with 15,000*l.* to be equally divided between the children of my elder sister." By that codicil, therefore, he bequeaths, in the event which has happened, the whole of Hordley to his younger sister and her children; but charged with a sum of 15,000*l.* for the benefit of the children of the elder sister. It turns out, however, that by the operation of a rule of law, the devise, as to one moiety of that estate, fails: but the charge, in my opinion, subsists notwithstanding, and takes effect with respect to the moiety of the Hordley estates which passed under the devise. The decree of the Vice-Chancellor must be affirmed.

(*a*) Affirming the judgment of the court below, reported in 13 Ves. 209. So Anon. Gilb. E. R. 15.

(*b*) See also Hooley *v.* Booth, 2 Vern. 359; Tyte *v.* Tyte, 1 Vern. 270; Parker *v.* Lamb, 3 B. P. C. 12, Tomlins's ed.; Oke *v.* Heath, 1 Ves. Sen. 135; Holmes *v.* Goodworth, June 1831, before lord Brougham C. post. As to a charge on stock legacies which partially fail by ademption, see Humphreys *v.* Humphreys, 2 Cox, 184; Browne *v.* Groombridge, 4 Madd. 495.

Norton *v.* Wood.

Russell and Mylne, 178.

At the time of executing a bond to secure a sum of money, the obligors procure a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest be regularly paid: the letter is a binding undertaking.

Payments of interest made one or even two days after they became due, are no defeasance of the undertaking, if the grantor accepts them without objection.

Feb. 6, 1830.

ONE of the plaintiffs was indebted to the defendant in the sum of 6000*l*, to secure the repayment of which, with interest, the other plaintiffs joined with the principal debtor in executing a bond for the amount; and at the same time stipulated for and obtained from the obligee a written memorandum, which was in these terms:—"15th April 1826. Mr B. Norton and Mr W. Norton. Gentlemen, if the interest on the money, say 6000*l*., be regularly paid, it is not my intention to call in the amount for four years from this day. I am, &c. John Wood."

The obligee having commenced an action on the bond, the bill was filed to have the benefit of the undertaking, and to stay the proceedings at law. The answer stated, that the plaintiff, W. Norton, had paid to the defendant the following sums in respect of the interest of the said 6000*l*.—on the 15th of October 1826, the sum of 150*l*.—on the 17th of April 1827, the sum of 150*l*.—on the 16th of October 1827, the sum of 150*l*.—on the 15th of April 1828, the sum of 150*l*.—and on the 14th of October 1828, the sum of 150*l*.; and that the plaintiff had in manner aforesaid paid to the defendant the interest of the whole of the sum of 6000*l*., down to the 15th of October 1828, which was admitted to be the last half-yearly day of payment: but the defendant denied that such interest was in all instances regularly paid, inasmuch as the same was payable on the 15th of April and the 15th of October in each year; whereas, in one of the cases above mentioned, it was not paid till the 17th of April, and in another till the 16th of October.

The Vice-Chancellor was of opinion that the memorandum amounted in equity to a good undertaking in the first instance, but that, under the circumstances stated in the answer with respect to the manner in which the interest had been paid, it had ceased to be binding on the defendant, and he therefore dissolved the injunction.

Mr Bickersteth, on moving to discharge that order, submitted, that the Vice-Chancellor's construction of the memorandum was right, but that no breach of the condition had ever taken place. On one occasion the interest had been paid a day before it became due, and it had once been too late by a single day, and once by two days; but these were mere accidental slips, the benefit of which, if they could not be relieved against in equity, was waved by the defendant accepting the money without objection at the time, and by continuing to receive other payments, which were made on the proper days.

[Norton *v.* Wood.]

Mr Barber, contrà, contended, that this memorandum imposed no obligation on the grantor, but was simply an expression of his intention, which circumstances might induce him to change. The bankruptcy of the principal debtor had occurred since, which altered the case very materially. The acceptance of the interest, which was a debt due independent of the memorandum, could be no waver.

The Lord Chancellor. The question, whether payment of interest tendered after it is due, and accepted by the creditor, is or is not a regular payment, is one which at law would be left to the jury. As to the construction to be put upon the memorandum, I agree with the opinion of the Vice-Chancellor; and then, the only remaining question will be, whether this amounts to a regular payment of the interest. Upon that point, I feel myself bound to express a different opinion from that entertained by his honour. I think, if money is tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waver of the objection; it must be taken as a regular payment, if the person receives it the day after without making any objection. The order of the Vice-Chancellor must be discharged; but if any interest has since become due, it is competent to the defendant to move to dissolve the injunction.

Coats *v.* The Clarence Railway Company.

Russell and Mylne, 181.

A railway company, in exercise of the powers conferred on them by an act of parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch over a mill-race, for the purpose of sustaining an embankment on which the railway was to be constructed; and it appeared that injury would be done to the mill, if the arch were of the proposed dimensions, but that the injury would be avoided, if the arch were of certain larger dimensions; an injunction was granted to restrain the company from making over the mill-race an arch of less than certain specified dimensions.

August, November 1829; January 1830.

AN act of parliament, passed in the ninth year of Geo. 4., incorporated a number of persons under the name of the Company of Proprietors of the Clarence Railway; gave them the powers necessary for making a railway through certain specified districts; and, for that purpose, authorized them to enter into, and do various acts in and upon the lands of all persons whomsoever; at the same time providing that the company should do as little damage as might be in the execution of the powers conferred on them, and that they should make to the owners and occupiers of, and all persons interested in, any hereditaments which might be taken, used, or injured, full satisfaction for all the damages sustained by reason of the execution of such powers: And—for settling all differences which might arise between the company and the owners and occupiers of, and the persons interested in, the hereditaments which might be set out and ascertained for making the said railways or tramroads, and other works and conveniencies, or which might be otherwise affected or prejudiced by the

execution of the powers thereby granted, touching the purchase-money to be paid, or recompence to be made respectively for or in respect of the same—it was, amongst other things, enacted, that if any person seised or possessed of, or interested in any such hereditaments, should not agree with the company for the sale and conveyance of their interest therein, a jury should assess and ascertain the sum or sums of money to be paid for the purchase of such hereditaments, and also what separate and distinct sum or sums of money should be paid by way of recompence, either for damage which should before that time have been sustained, or for the future temporary or perpetual continuance of damage, the cause or occasion of which should have been only in part obviated, repaired, or remedied. A subsequent clause enacted, that the company should, at their own costs and charges, make, or cause to be made, such arches, tunnels, culverts, drains, or other passages over, under, or by the side of the railways or tramroads, and the fences on the sides thereof, and of such depth, breadth and dimensions, as should be sufficient at all times to convey the water clear from the lands adjoining or lying near to the said railways or tramroads, without obstructing or impeding the same, to the prejudice of any of the said lands or grounds.

The bill was filed against the company by the owner of a water corn-mill, and of a mill-race, by which water was conveyed from a neighbouring brook. It stated that the intended railway was to pass over this mill-race; that, in pursuance of such intention, the company were about to build a bridge over the mill-race, as a foundation for a large and heavy embankment, on which the railway was to be constructed: that the proposed dimensions of the bridge were insufficient for the effectual support of the embankment and the railway, and too small to secure at all times the free passage of the water; and that the intended works, if executed in the manner then contemplated, would greatly injure the plaintiff's mill. Part of the relief prayed was, that the company might be restrained from building over the mill-race any bridge of the dimensions, size and construction thereinbefore specified, or any other bridge, unless the same should be of such dimensions and strength as would effectually support the embankment and railway, permit the water to pass to and from the mill as freely and uninterruptedly as theretofore, and leave to the plaintiff the benefit of the several ways and passages then enjoyed by him on the banks of the mill-race.

The plaintiff moved for an injunction: and, after some discussion, an order was made by consent, referring it to an engineer to report, whether the mill would sustain, in respect to the flooding and supply of water, any and what injury from the execution of the proposed works; and the company were to be at liberty, in the mean time, to proceed in the erection of their bridges, undertaking to abide by any further order of the court respecting them.

The engineer reported, that the mill would sustain injury as well from the retardation of the stream in passing through an arch of the figure and dimensions of the passage proposed to be left for the mill-race under the intended embankment, as from occasional obstructions of the archway during winter by the accumulation of ice and wreck, which it would be extremely difficult, if not wholly impossible, for the miller to remove; and that, in order to secure to the plaintiff the same enjoyment of the working power of his mill as he would have had if the Clarence railway

[Coats *v.* The Clarence Railway Company.]

had not been constructed, the arch over the mill-race ought to be of certain dimensions therein specified.

The defendants now moved that the report of the engineer might be rescinded, or not confirmed; that they might be discharged from their undertaking; and that they might be allowed to proceed generally with their works.

The Solicitor-General and Mr Ching, for the motion.
Mr Bickersteth and Mr John Wilson, contrà.

In support of the motion, it was contended, that the conclusion, to which the engineer had come, was contrary to the evidence, and that the proposed works would not inflict any injury on the plaintiff. But admitting that some injury might ensue, the court had no jurisdiction. The act of parliament had pointed out the only remedy to which the plaintiff was entitled; it had given him a right to compensation, and had fixed the mode in which the amount of compensation was to be ascertained. He might claim that compensation, but he could not call upon the court to prevent the company from exercising the powers which the act of parliament had conferred on them. The case would be different, if the company were proposing to do what the act of parliament did not authorize; but there was no suggestion to that effect: it was not even hinted that they were exceeding their powers. The complaint was merely, that, in doing what the act empowered them to do, they were about to inflict injury on the plaintiff's property.

On the other hand, it was argued on behalf of the plaintiff, that the right to compensation, given by the act of parliament, did not exclude the regulating and restraining jurisdiction of the court; and that nothing would be more pernicious than to hold, that the large and ample powers conferred by such acts of parliament, were not subject to any control. The company were not to be prevented from doing any thing which was necessary to the due prosecution of their undertaking; but, on the other hand, they were not to prosecute it in such a manner as to do unnecessary injury to others. They had a right to build a bridge over the mill-race; but a bridge of the dimensions which they proposed to erect, would lessen the working power of the mill, while a bridge of somewhat larger dimensions would leave it unimpaired. Why, then, were they to be permitted to exercise their powers in such a manner as would be injurious to the owner of the mill, when, by incurring a little more expense, they might accomplish their object without damage to any one?

The Lord Chancellor was of opinion that, in such a case, the court ought to interfere to protect the plaintiff; and he awarded an injunction, by which the company were restrained from making over the mill-race any arch of less dimensions than the arch recommended by the engineer's report.

Reg. Lib. 1829, A. 1827.

Greenwood *v.* Taylor.

Russell and Mylne, 185.

A mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor: Held, that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate.

Rolls.—January 22, 1830.

IN this suit, which was instituted for the administration of the estate of the deceased mortgagor, the mortgagee presented a petition praying that he might be permitted to prove in the cause for the full amount of the mortgage debt, and that the mortgaged estate, which was alleged to be insufficient to pay the debt, might be sold, and the produce paid to him, and that to the extent of the deficiency he might receive payment from the proof in the cause *pari passu* with the other specialty creditors.

Mr Swanston, for the petition.

The mortgagee has a right to avail himself, concurrently, of all the remedies which belong to him, either in respect of his specific lien on the estate, or as a general creditor of the mortgagor by virtue of the covenant for the payment of the mortgage money. In availing himself of the benefit of the covenant, he is not bound to relinquish any part of the benefit arising from his real security. The petitioner, in this case, is unquestionably a specialty creditor of the testator: what is there to prevent him from proving under the decree the whole amount of his demand, in the same manner as he might have sued the testator, if alive, and taken out execution against him for the whole amount? If his mortgage is satisfied by what he receives under the decree, the representatives of the mortgagor will be entitled to have the estate reconveyed; if it is not satisfied, the petitioner will still be mortgagee *pro tanto*, and if none of the parties interested think it worth while to redeem, he would have a right to foreclose. But he does not insist on that strict right: he is willing that the estate should be sold, and he offers that it should be treated, subject to his lien, as a part of the general assets of the testator.

It is true that, in bankruptcy, the mortgagee does not prove till after the mortgaged estate has been sold, and that his proof is only for the deficiency. But that rule depends on principles peculiar to the jurisdiction in bankruptcy. The great object in bankruptcy has uniformly been to place all who seek the benefit of the commission on a footing of equality: and in furtherance of that object, though the creditor, who has a security, need not come in under the commission, yet, if he wishes to prove his whole demand, he must relinquish his security for the general benefit of the creditors. That rule never has been and cannot be extended beyond bankruptcy; if it were applied to the present case, it might in like manner be contended, that, because under a commission specialty creditors and simple contract creditors share alike, they ought, therefore, to be placed on the same footing, whenever assets are administered in this court.

[Greenwood *v.* Taylor.]

Mr Tinney and Mr Stuart, contrà.

The MASTER of the ROLLS. The rule in bankruptcy must be applied here: and the mortgagee cannot be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. This rule is not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets. The mortgagee, who has two funds, as against the other specialty creditors, who have but one fund, must resort first to the mortgage security, and can claim against the common fund only what the mortgaged estate is deficient to pay (*a*).

Lynn *v.* Ashton.

Russell and Mylne, 188.

A feme covert having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death to trustees, upon trust, to invest the fund in the immediate purchase of an annuity for her life. The court ordered a transfer of the fund to the new trustees accordingly. *Rolls.*—January 28, 1830.

BY a settlement dated in 1797, and made in contemplation of the marriage of Mr and Mrs Lynn, a fund, amounting to about 1400*l.* three per cent consols, was vested in trustees on trust, after the marriage, to pay the dividends to Mrs Lynn for her separate use during her life, and after her death, to transfer the fund to such person or persons as she should by any deed or writing appoint; with limitations over, in default of appointment, to her children, and if there were no children, to her next of kin. In 1827 she, by a deed to which her husband was a party, assigned her life interest to two trustees, and by the same instrument appointed the capital of the fund after her death to the same trustees, upon trust that they should immediately, with all convenient speed, apply 1200*l.* stock, part of the fund, in the purchase of an annuity for the lives of her and her husband, and the life of the survivor, and that they should stand possessed of the residue of the stock upon the trusts therein mentioned.

One of the trustees, in whose name the fund stood, declined to transfer the stock to the new trustees without the direction of a court of equity; and the present bill was filed to compel him to concur in such transfer.

Mr Pemberton and Mr Purvis, for the plaintiffs.

As this lady's life interest is settled to her separate use, she is, with respect to it, a feme sole, and has a disposing power over it: therefore, that life interest is well vested in the trustees to whom it has been assigned. Sturgis *v.* Corp, 13 Ves. 190. The same trustees, by virtue of the appointment, take the capital of the fund after her death. Thus, they

(*a*) See Tooke *v.* Hartley, 2 Dick. 785; S. C. 2 B. C. C. 125; Aylet *v.* Hill, 2 Dick. 551; Wiseman *v.* Carbonell, 1 E. Ab. 312. As to the practice in bankruptcy, Ex parte Smith, 2 Rose, 63, and the cases there cited.

have the whole interest, present and future; and must, therefore, be entitled to a transfer of the stock.

Mr James, for the trustees in whom the fund was vested, referred to Goldsmid *v.* Goldsmid, 1 Turner and Russell, 445.

Mr Pemberton, in reply.

The MASTER of the ROLLS, after some hesitation, made the order; considering that, by the union of the life estate with the remainder, there was no *scintilla* of interest left in any other person.

Pritchard *v.* Draper.

Russell and Mylne, 191.

Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner.

One of the two partners, after the dissolution of the partnership, received the rents of a debtor to the partnership, and retained out of them the amount of the debt; and he stated, that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these moneys; but no account had been settled between him and the debtor: Held, that, as against the other partner, the debt to the partnership was not to be considered as satisfied.

In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer, that he had not delivered a signed bill conformably to the act of parliament: a bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill: *Semble*, the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured:

But held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions.

Rolls.—Jan. 28, 1830. L. C. July 1, 5, 1831.

THE plaintiff Pritchard and the defendant Draper being in partnership as solicitors and attorneys, were employed by sir Thomas M. Wilson in that capacity, and also as receivers of the rents of his estates. The partnership was dissolved in October 1817. From that time until September 1820, Draper was the solicitor of sir Thomas Wilson, and the receiver of his rents; and of that fact Pritchard was well aware. In July 1818, Draper transmitted to sir Thomas Wilson a bill of costs due from him to the partnership; and the balance against Wilson on that bill, after giving him credit for various payments, amounted to 442*l.* On the 17th of February 1821, Pritchard gave notice to sir Thomas Wilson not to pay Draper the balance of the bills due to the late partnership. On the 22d of the same month Draper entered into a written agreement with Pritchard, by which, after reciting that 750*l.* was due to Pritchard in respect of the partnership transactions, he, Draper, engaged to secure the repayment of that sum by his bond, and by an assignment of all the outstanding partnership debts; and, immediately afterwards, notice of this agreement was served on sir Thomas Wilson.

The suit was instituted in May 1821, by Pritchard against Draper and sir Thomas M. Wilson, for the purpose of having an account taken of what was due from sir Thomas M. Wilson to the partnership. The bill

stated, that the defendants alleged that, after the dissolution, Sir Thomas M. Wilson paid to Draper the debt due to the partnership ; and it charged that, if any payment took place, it was made after Sir Thomas M. Wilson had notice of Draper's agreement to assign the outstanding debts to Pritchard.

Sir Thomas Wilson died before he had put in an answer. The suit was revived against his executors ; and they, by their answer, stated, that no bill of costs, signed conformably to the act of parliament(*a*), had been delivered to them or to sir Thomas Wilson. The plaintiff then filed a bill of supplement, in which he alleged that, subsequently to the institution of the suit, namely, on the 27th of May 1823, he delivered to one of the executors a bill of costs, signed in conformity to the requisition of the act of parliament.

At the original hearing, a decree was made, referring it to the Master to tax Pritchard and Draper's bill of costs, and to take an account of what, if any thing, was due from the estate of sir Thomas M. Wilson in respect of such bill ; with liberty to state special circumstances.

In the proceedings before the Master, interrogatories for the examination of Draper were exhibited both by the plaintiff and by the executors of sir Thomas M. Wilson. Draper, in his answer to the plaintiff's interrogatories, stated that he did not, after the dissolution of the partnership, settle any account with sir Thomas M. Wilson ; that sir Thomas M. Wilson had not debited him with, or in writing allowed him, any sum expressly on account of costs : and that no account had been adjusted or agreed upon between them, in which credit was given to the examinant for any sum as paid to or retained by him on account of costs. In answer to the interrogatories exhibited by the executors of sir Thomas M. Wilson he stated that sir Thomas M. Wilson had desired him, when he had moneys in his hands, to retain what he wanted : that he accordingly from time to time retained various sums with the permission or by the direction of sir Thomas M. Wilson; that by these means the examinant received the whole amount of the bill of costs due to the partnership at the dissolution ; that the full balance of the bill was paid in September 1820, when he retained a sum of 282*l.* ; and that it was understood by him, and, as he believed, by sir Thomas M. Wilson, that credit should be given to the examinant in his account with sir Thomas M. Wilson for the sums so paid and retained by him, when the accounts should, at a future time, be settled between them.

The circumstances, as stated above, were found by the report ; but the Master was of opinion that the balance of 442*l.* was still due from Wilson's estate. And the question, on further directions, was, whether the debt, which was due from Wilson to the partnership at the time of the dissolution, was satisfied by the sums subsequently received and retained by Draper.

Mr Treslove and Mr O. Anderson, for the plaintiff.

The facts, which are specially stated in the report, afford no ground for disturbing the conclusion to which the Master has come. It is not denied that Draper was indebted to sir Thomas M. Wilson ; but the debt due to him from one of the partners cannot be set off against the debt due from him to the partnership. Draper's examination ought not to be referred to. He was examined as a party in the cause. The plaintiff does not need to have recourse to any part of either of the examinations in order to support his case; and the defendant cannot read them to disprove that case. Even

(*a*) 2 Geo. 2. c. 23, s. 23.

if Draper's statements be admitted, they do not show that the debt due to the partnership was in any way satisfied. All that appears is, that he had moneys in his hands as receiver to sir Thomas M. Wilson; and he now chooses to say, that these moneys were retained by him in satisfaction of the partnership debt. It is clear that nothing passed at the time, which, if sir Thomas M. Wilson had brought an action against him for the balance in his hands as receiver, would have enabled him to set off the debt due to the partnership against that demand. Jeffs *v.* Wood, 2 P. Wms, 129; Heath *v.* Percival, 1 P. Wms, 683.

Mr Pemberton and Mr Cooper, contrà.

The Master has set forth in his report the substance of Draper's examination; and it is an extraordinary position to say, that the court is not to look at what the Master has so stated; particularly when it is considered that one of the examinations is in answer to interrogatories exhibited by the plaintiff. From these examinations it appears that Draper, out of the moneys which came into his hands as receiver, retained the amount of the bill of costs in or prior to September 1820, and that he did so with the permission of sir Thomas M. Wilson, and on the understanding of both parties, that sir Thomas M. Wilson was to have credit for that sum on the final settlement of accounts. Retainer, under such circumstances, is the same thing with payment; and as the claim of the partnership would have been extinguished by a payment in 1820 to Draper, it must be equally satisfied by his retainer of the amount. It is quite immaterial that no formal settlement of accounts took place, in which sir Thomas Wilson was debited with the sum so retained, or that there was not an express sanction of the act of Draper on each occasion on which any sum was retained. The substance of the transaction was, that, by the agreement and understanding of both parties, Draper was entitled to retain the amount of the bill of costs out of the moneys in his hand; and the only question that remains is, did he so retain it?

The Master of the Rolls. Had the case made by the bill been consistent with the facts as they appear in the report, the Master's finding would have been consistent with the law. But the case made by the bill is totally different from the case stated in the report. The bill alleges that the partnership debt, if paid at all, was paid by sir Thomas Wilson, after he had notice of the assignment by Draper to Pritchard of all the outstanding partnership debts: whereas it turns out that the payment, on which the defendants insist, was prior to the assignment, and consequently prior to any notice of the assignment. It is clear that payment, after dissolution, by a debtor of a partnership to any one partner, is a good payment, unless there be notice that the debts are to be paid to some other person. If the debtor, instead of paying what he owes, gives one of the partners authority to receive moneys on his account, in the confidence that they will be applied in satisfaction of his debt, retainer of these moneys by the partner receiving them is equivalent to payment. In the present case it must be intended, that sir Thomas Wilson gave Draper authority to retain moneys due to him, in the confidence that these moneys were to be applied in payment of the debt due to the partnership.

The bill must be dismissed, with costs up to the original hearing.

From that decree the plaintiff now appealed

[Pritchard *v.* Draper.]

July 1, 1831.—Sir Edward Sugden, Mr Treslove, and Mr O. Anderdon, for the appellant, contended, that lord Gifford, by the decree which he had made at the rolls directing inquiries and accounts, sufficiently declared his opinion that this was a proper case for a suit in equity. From the situation in which the parties stood with relation to each other, it was impossible for sir Thomas M. Wilson to set off costs due from him to the firm against sums received for him by Draper in his individual capacity as a receiver of the rents of his estates, or for the latter, without the express authority of his partner, to apply the sums so received in discharge of a debt due to the partnership. Todd *v.* Reid, 4 B. & A. 210; Russell *v.* Bangley, 4 B. & A. 395. The admissions of Draper, in an examination taken long after the partnership was dissolved, and touching matters which had happened subsequently to the dissolution, could not be evidence to affect the rights of his former partner. In Wood *v.* Braddick, 1 Taunt. 104, C. J. Mansfield lays it down as clear law, that "the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation." If, however, the evidence of Draper were to be admitted, it would be found, when closely examined, not to establish the fact, that any authority (allowing that to be sufficient) was ever given by Wilson to appropriate his moneys in Draper's hands to the satisfaction of the joint debt which he owed to the firm; or that Draper, in consequence of such authority, ever made any express appropriation to that specific object.

The Solicitor-General (sir W. Horne) and Mr Cooper, in support of the decree, insisted that the suit ought to have been dismissed at the original hearing. No bill of costs had been delivered a month before the filing of the bill, as was required by the 2 Geo. 2. c. 23, s. 23(*a*), although that statute clearly applied to suits in equity as well as to actions at law: and the supplemental bill, before the filing of which a bill of costs was regularly delivered, and which was intended to put that fact in issue, could not remedy the defect. The evidence of the defendant Draper, touching matters that occurred after the separation, but having a direct reference to partnership transactions, was clearly admissible; and whatever the chief justice might have thrown out incidentally in Wood *v.* Braddick, the decision in that case, so far from being an authority for rejecting the evidence, was rather the reverse. If, however, the law had been otherwise, it was not competent for the party, at whose instance the examination had been taken, to turn round now and endeavour to get rid of it. Upon the result of that examination, it was fully made out that Draper was sufficiently authorized to make the application of the sums in his hands in discharge of the partnership demand.

The Lord Chancellor (Lord Brougham). The debt, which the suit seeks to recover, was a taxable bill of costs; and if an action at law had been brought, it could not have been maintained on the evidence which was before lord Gifford, when he made the original decree; for the 2 Geo. 2. requires that a signed bill should be delivered one month before the action brought, and in the present case no such bill had been delivered. Suits in equity are subject to this provision of the statute as well as actions at law; and the words "solicitor in chancery" are expressly inserted in the act.

(*a*) Made perpetual by 30 Geo. 2. c. 19, s. 75.

The supplemental bill, which was subsequently filed for the purpose of remedying that defect, and of introducing the statement that a bill of costs duly signed had been delivered after the institution of the suit, could not have cured this objection: and if the decree of lord Gifford had been appealed from, it could not have stood; the original bill must have been dismissed. But that judgment not having been appealed from, I think, on the whole, it is now too late to take the objection.

The question in the cause is, whether or not sir Thomas Wilson has paid the bill of costs which was due to the firm of Pritchard and Draper; and that turns upon this,—whether the payment is proved or not by Draper's examination. Draper was a partner at the time when the liability was incurred: the contract, out of which it arose, was made by sir Thomas Wilson with Draper and Pritchard jointly, and they were jointly employed by him. Draper is examined, after the partnership had ceased, as to a fact relating to the partnership transactions, or connected with them, but which fact took place after the dissolution of the partnership. The case, then, stands thus: is this deposition of Draper, who was once a partner with Pritchard, but, at the time of the deposition, had ceased to be such partner, evidence, not only with respect to what took place during the partnership in connexion with partnership transactions, but with respect to what took place relating to a partnership transaction subsequently to the cessation of the partnership?

Suppose the question arose in an action at law, and that another witness had proved that Draper, after he had ceased to be a partner, had made an admission touching something relative to a partnership transaction, which something took place subsequently to the termination of the partnership: that, I am of opinion, would have been evidence. If, before lord Tenterden's act, two persons made a joint promissory note, and six years ran before an action was brought, an acknowledgement of liability by one of those persons was sufficient to take the case out of the statute of limitations, although made respecting a fact which took place long after the connexion of the parties, as makers of the note, had ceased. That was decided by the king's bench in Whitcomb *v.* Whiting, Douglas, 652, and the same doctrine was held in the common pleas. In such circumstances, a declaration made by one partner only was sufficient to bind the other, and to support the action against both; and upon this specific ground,—that, in respect of the promissory note, on which, in Whiting *v.* Whitcomb, the question arose, the liability was joint; and what one person, jointly liable, says respecting the subject-matter of a joint contract, is evidence to affect all his co-contractors. So firmly settled was the law on this point, that, to alter it, an express clause has been inserted in lord Tenterden's act.

Now, wherein does such a case as that which I have mentioned differ from the present? This was a partnership transaction—a joint claim arising out of a joint employment. The partnership, it is true, had ceased; but so, in Whitcomb *v.* Whiting, had the connexion between the two makers of the promissory note. Wood *v.* Braddick, 1 Taunt. 104, as far as it goes, is in favour of the same doctrine. There the letter of one Cox, written after the cessation of the partnership between him and the defendant, and stating a balance to be then due from them, was held to be admissible. That was a declaration relating to something connected with partnership transactions, but which something happened after the cesser of the partnership.

Upon the whole, I am clearly of opinion that the declaration of Draper would have been evidence; and *à fortiori*, that his formal examination in the cause is evidence to affect Pritchard's right in a partnership affair, although touching matters which have occurred since the dissolution of the partnership, namely, the subsequent payment of a partnership demand. I have consulted one of the chief justices on the point, and I have great satisfaction in finding, that he entertains no doubt as to the admissibility of such evidence.

The question then resolves itself into this, whether Draper's evidence proves the payment of the bill of costs by sir Thomas M. Wilson. If I could view the facts of the case in the same light in which they appear to have presented themselves to the Master of the Rolls, I should not hesitate to affirm the judgment. But the question of fact is, whether or not Draper, being in the receipt of Wilson's money as his receiver, apart from the firm of Draper and Pritchard the solicitors, was directed by sir Thomas M. Wilson to apply his, sir Thomas M. Wilson's, money, which he so received apart from the partnership, to the payment of the partnership debt; and it is for sir Thomas Wilson's executors to prove that Draper had such authority.

Now, it appears to me, that, taking the whole of Draper's examination together, there is no evidence that sir Thomas Wilson did authorize Draper to apply the money received by him to the payment of the debt due to the partnership; and, on the contrary, that there is evidence that no such authority was given. It is true that Draper, when he speaks in general terms, gives, as witnesses very often do, an inaccurate representation of what occurred: he states his opinion or impression as to a result; but when he comes to particulars, the inaccuracy is corrected. He says that he had authority to pay the partnership debt; but when he descends into particulars, what he sets forth as an authority amounts to no authority at all; so that it is quite clear that his general assertion must go for nothing. He says, that the debt was paid: but let us see what he calls payment: "and this examinant saith, that the said bill was paid, or this examinant received the amount thereof, at various times, and by various sums of money; some of which sums were paid to this examinant by the direction of sir Thomas M. Wilson, and others of them by moneys retained by this examinant by the direction and with the permission of the said sir Thomas M. Wilson, out of moneys belonging to him, which had been received by this examinant." If the evidence had stopped here, I should have said this was evidence of an authority to apply or appropriate to payment of the debt in question, the money of sir Thomas Wilson which he, Draper, either then had or was to have in his hands. But the examination proceeds: "and this examinant does not recollect or believe that such moneys, or any part of them, were retained by him expressly on account of such bill of costs." Unless he retained them expressly on that account, there was no payment. The operation of payment was to be effected under sir T. Wilson's authority, and it could be effected only by retainer expresssly on account of the debt. Again—"for when this examinant had moneys of the said sir T. M. Wilson in his hands, the said sir T. M. Wilson told him to retain what he wanted, as money would be of no use to him, this examinant." This might be as an accommodation or convenience to Draper personally. Draper adds, that "he accordingly retained the moneys mentioned in the schedule to the report; that to the best of his belief there was not any money due from the estate of sir

Thomas M. Wilson to the partnership." That, however, is merely his opinion as to the result, which is a matter rather of law than of fact.

Taking the whole of the examination together, I think it is clear that there was not any direct authority from Wilson to apply or appropriate his moneys in Draper's hands to the payment of the joint debt due to Pritchard and Draper; and that in fact there was not any express appropriation by Draper of those moneys to that purpose. The decree, therefore, must be reversed.

Vawdry *v.* Geddes.

Russell and Mylne, 203.

A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age: Held, that the children of the sisters were not to take a vested interest, till they attained twenty-two: and, that all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote.

Rolls.—Jan 27, Feb. 4, 1830.

THE testatrix, Amy Seaman, after giving some legacies, and directing by her will the sale of certain property in manner therein mentioned, proceeded in the words following: "and I do direct that the money to be paid for the same, and all the produce of the residue of my estate and effects, after paying the beforementioned legacies and funeral expenses, and any debts which I may owe, shall be placed out upon mortgage or government security, and the interest, dividends, or produce thereof, shall be equally divided between my four sisters, for their sole and separate use, and independent of the control or authority of their husbands, during their natural lives; and on the death of my sisters, I will and direct that the interest of their respectives shares shall, at the discretion of my executors, be applied to the maintenance and education, or accumulate for the benefit of the children of each of my sisters so dying, until they shall severally attain the age of twenty-two years; and, upon any of their attainment to that age, they shall be entitled to their proportion of their mother's share of the principal; and in case of any of their decease under that age, leaving lawful issue, such issue shall be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto, with the benefit of the interest or produce thereof in the mean time; but in case any such children shall die under the said age, without leaving issue, or such issue shall die before they are entitled to the principal of their shares, that then the other children of my said sisters shall be entitled thereto, together with the issue of any of them who shall be then dead, in like manner, and with the like benefits of survivorship as their original shares: but in case all the children of any of my said sisters shall die without issue, or, there being such issue, they shall die before the principal of their respective shares shall become payable, then

the share of such of my sisters, whose children shall so die, shall be paid and applied to and for the benefit of my other sisters, and their respective children or issue, in like manner as their original shares; and upon the decease of my sister Hannah Evans, leaving no issue, I will that my brother-in-law, William David Evans, shall have the interest and produce of her share during his natural life, and that, upon his decease, the same shall be applied to and for the benefit of my other sisters and their children, in like manner and with like power of survivorship as the shares of my other sisters are."

The testatrix died in 1798.

Catherine Perrin, one of the four sisters mentioned in the will, died in February 1803, leaving an only child, Sarah, born in the testatrix's lifetime: Sarah intermarried with William Geddes, and afterwards died in the lifetime of her husband, at the age of nineteen, leaving a son, the defendant Archibald Perrin Geddes, who subsequently attained the age of twenty-two years. Elizabeth Nicholson, another of the four sisters of the testatrix, died in 1810, leaving the defendant Peter Nicholson, her only child, who was born in the testatrix's lifetime, and had long since attained his age of twenty-two years. The other two sisters of the testatrix were still living: one of them had never had any child; the other had several children, who were born in the lifetime of the testatrix, and had all attained the age of twenty-two.

The bill was filed for the purpose of ascertaining the interests of the parties in the residue, and of having it declared by the court who were the persons now entitled to the shares of the two deceased sisters.

Mr Duckworth, for the plaintiff.

Mr Bickersteth and Mr Koe, for some of the defendants.

All the limitations after the life estates are void. Leake *v.* Robinson, 2 Mer. 363; Bull *v.* Pritchard, 1 Russ. 213.

Mr Pemberton and Mr Simpkinson, for the representatives of a grandchild who died under twenty-two, referred to Booth *v.* Booth, 4 Ves. 399; Hanson *v.* Graham, 6 Ves. 239; Murray *v.* Addenbrooke, 4 Russ. 407.

Mr Temple, for a grandchild who had attained twenty-two.

The bequest may fairly be confined to such children of the sisters as were in esse at the death of the testatrix. Blandford *v.* Thackerell, 2 Ves. Jun. 238; Longdon *v.* Simson, 12 Ves. 295.

The Master of the Rolls. I am not able to distinguish this case from the residuary gift in Leake *v.* Robinson, 2 Mer. 363. There, as here, it was the gift of a residue; there, as here, the trustees were at their discretion to apply the rents, interest, and dividends to the maintenance and education of the children, until they attained the prescribed age; and there, as here, if any of the children died before that age, their shares were to go over to the surviving children. In that case, the shares of the children were not only to take effect upon their attaining the prescribed age, but also upon marriage, which is not the case here; but that, in principle, can make no difference. In that case sir William Grant proceeds upon this principle,—that the prescribed time cannot be considered as marking only a time of postponed payment, because there is no antecedent gift—no gift but in the direction to pay at the particular period.

It was argued, that the children took vested interests, because the trustees had a discretion either to apply the income in the maintenance or edu-

cation, or to accumulate it for the benefit of the children; and that this is, in effect, a gift of the whole interest until the prescribed age, subject, however, to be devested. But, if the whole interest had been expressly given to the children until they attained twenty-two, I do not agree that the shares of the children would therefore have vested, subjected to be devested. The case of Batsford *v.* Kebbell, which is referred to by sir William Grant in Leake *v.* Robinson, is an authority directly in point against that proposition. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely, when the testator has expressly declared, that the legacy is to go over, in case of the death of the legatee before a particular period. I speak here of gifts of personal estate, and not of real estate.

The language of this will gives an equal interest to all children of the sisters, whether born before or after the death of the testatrix.

The statute of accumulation was passed subsequently to the death of the testatrix, and can have no effect upon this will.

My opinion, therefore, is, that the gifts over to the children of the sisters, whether born before or after the death of the testatrix, not being to take effect until the age of twenty-two, are too remote and void.

Arnold *v.* Congreve.

Russell and Mylne, 209.

A testatrix having a son and two daughters, gave 6000*l.* three per cent stock to her son for life, remainder, as to one moiety of it, to his eldest male child living at her decease; and as to the other moiety, to his other children; she also gave 6000*l.* like stock to her daughters for their respective lives, in equal shares, remainder to their children; and she further gave a sum of bank stock to her three children in equal shares during their lives, and the share of each was, at his or her death, to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of these two stocks should be settled upon them for their lives, and afterwards upon their children: Held,

That, by the operation of the codicil, the moiety of 6000*l.* three per cent stock, which, by the will, was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children;

That, as to all the other bequests, the attempt to extend the limitations to great grandchildren was ineffectual; and

That the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil.

Feb. 4, 1830.

THE will of Susannah Olivier, dated the 20th of September 1792, contained, among other clauses, the following:—"I leave and bequeath 12,000*l.* three per cent reduced annuities, which I have now transferred from the four per cent stocks; the same to be put in trust in the hands of my three executors, to be employed in the following manner:—One half, or 6000*l.* of the said trust, the interest thereof shall be for the use of my son, the Rev. Daniel Stephen Olivier, during his life, and shall be duly paid unto him as his property; and, at his death, one half, which will be

3000*l.* stock, shall revert to my son's eldest male child living at my demise, and the other half, or 3000*l.* stock three per cent reduced, shall be divided in equal shares between his other children lawfully begotten; but, should my son die without leaving issue, in that case, the whole of his moiety, or 6000*l.* three per cent reduced stock, shall revert in equal shares between my other two children, during their lives, and at their death, it shall revert to their issue; or, should either of them die without leaving issue, it shall, in that case, revert in equal parts to those of my grandchildren that shall then remain. The other moiety, or 6000*l.* of the 12,000*l.* three per cent reduced stock, in trust, shall be divided in equal shares between my two daughters, namely Julia Elizabeth Eyre and Margaret Esther Conybeare, the interest of which shall be duly paid them during their lives, and, at their death, each one's share shall revert to her children; but, should either of my daughters die without leaving issue, in that case their share of the trust, which will be 3000*l.* three per cent reduced, shall revert in equal shares between my surviving children, and, at their death, to revert to my surviving grandchildren in equal shares."

Another clause was as follows:—"I also leave, and order to be put in trust by my executors, 10,000*l.* bank stock, which now stands in my name, the interest of which shall be duly paid in equal shares to each one of my three children, during their lives, and at their death, each one's share or thirds of the 10,000*l.* bank stock, shall revert in equal shares between their issue; but, should either of my children die without leaving issue, in that case their share of the bank stock shall revert to the remainder of my children; and, at their death, to revert to their issue, or whatever issue shall remain from either of my children, in equal shares."

"All lapsed legacies," said the testatrix in a subsequent part of the will, "are to return to the bulk of my fortune, excepting those that are entailed, and the 700*l.* three per cent consols that I leave to Mrs Passmer, which reverts to my son, the Rev. Daniel Stephen Olivier, after her death, at his own disposal; neither shall any unentailed legacy return to the bulk that I leave to either of my children, in case they have any issue; and all the legacies that I leave to my grandchildren shall revert to their brothers and sisters, if they die minors; or if such legacies are not entailed, and even should they die in my lifetime, their share shall equally revert from the time this will is written.

The testatrix made a codicil, dated 30th of March 1800, which contained the following clause:—"I now furthermore request, that, at the death of each one of my children, who have any issue, the 10,000*l.* bank stock, and also the 12,000*l.* three per cent reduced, which by my will I have entailed upon my grandchildren, I would also have these, my grandchildren's share of the same two stocks, be also settled upon them, to enjoy the interest thereof during their lives, and afterwards to revert to their children lawfully begotten; but, in default of any issue, they may dispose of it as they may think proper.

The testatrix died on the 7th of January 1803, leaving Daniel Stephen Olivier, Margaret Esther Conybeare, and Julia Elizabeth Eyre, afterwards the wife of sir William Congreve, bart., her only children, her surviving.

Daniel Stephen Olivier had five children, of whom Daniel Josias was the eldest; and all of them were living at the death of the testatrix. Margaret Esther Conybeare had two children, both of whom were living at the death of the testatrix. Lady Congreve never had any children.

All the grandchildren of the testatrix were in *esse* at the time of her death; and afterwards several of them had children.

The questions in the cause were,—what extent of interest the grandchildren of the testatrix took under the will and codicil,—and whether there was any valid gift to the issue of the grandchildren.

Mr Bickersteth, for the plaintiffs.

Mr Tinney and Mr W. O. Carr, for Daniel Josias Olivier, by whom the following cases were cited: Hodges *v.* Middleton, Douglas, 131; Robinson *v.* Robinson, 1 Burr. 38; Seale *v.* Barter, 2 Bos. & Pul. 485; Tothill *v.* Pitt, 1 Mad. 488; Routledge *v.* Dorril, 2 Ves. Jun. 357; Leake *v.* Robinson, 2 Mer. 363; Sibley *v.* Perry, 7 Ves. 522.

Mr Pemberton and Mr Skirrow, for other grandchildren of the testatrix.

Mr Sidebottom, Mr West, Mr Teed and Mr Elderton, for great grandchildren.

Mr Treslove, Mr Boteler, Mr Roupell and Mr Lowndes, for other defendants.

The Master of the Rolls stated, that, the 3000*l.* being given to the eldest male child of the testatrix's son living at her decease, a life interest might be well limited to him, with remainder to his unborn children; that the will gave that sum absolutely to Daniel Josias as such eldest male child; but that the codicil ought to be read *reddendo singula singulis;* that the codicil, as applied to this bequest, amounted to a direction that Daniel Josias should enjoy the interest of the 3000*l.* during his life, and that the capital should, at his death, go to his children; and that these limitations of the 3000*l.* were within the rule of law.

His honour further stated, that the other bequests to the grandchildren of the testatrix could not be confined to grandchildren living at her death; that the words included every child whom her son or either of her daughters might at any time have; and, consequently, that, as to those bequests, limitations to the children of the grandchildren were void; that the testatrix, having, by the will, given her grandchildren absolute interests, had made a codicil expressing her desire that they should take only life estates, in order that their children might take in succession after their deaths; that her sole object in making the codicil, was to let in those children of grandchildren; that that purpose necessarily failed; and that, as the great grandchildren could not take, the intention of the testatrix would be best effectuated by holding that the absolute interests given to the grandchildren by the will were not destroyed by the codicil.

The decree declared that Daniel Josias Olivier, as the oldest male child of Daniel Stephen Olivier, living at the time of the testatrix's decease, was entitled, during his life, and from the death of his father, to the dividends of the sum of 3000*l.* bank three per cent reduced annuities in the will mentioned; that, as to the sum of 10,000*l.* bank stock, and all other the legacies and bequests to the testatrix's grandchildren in the will and codicils contained, except as to the said sum of 3000*l.* bank three per cent reduced annuities, the limitations over to the issue of the testatrix's grandchildren contained in the codicil of the 30th of March 1801, were void for remoteness; that, as to the sum of 10,000*l.* bank stock, Daniel Josias Olivier, as one of the grandchildren of the testatrix, and the issue of her

son, Daniel Stephen Olivier, was absolutely entitled to a fifth of a third part of the sum of 10,000*l.* bank stock; that the four other children of Daniel Stephen Olivier became absolutely entitled to the sum of 3000*l.* bank three per cent reduced annuities, further part of 12,000*l.* like annuities, and to four-fifths of the one third of the sum of 10,000*l.* bank stock in equal shares; that the children of Margaret Esther Conybeare were entitled to one half part of the sum of 6000*l.* bank three per cent reduced annuities, being the residue of the sum of 12,000*l.* like annuities, and to one other third part of the sum of 10,000*l.* bank stock, in equal shares; and that lady Congreve was entitled, during her life, to the dividends of the remaining 3000*l.* bank three per cent annuities, and of the remaining third part of the 10,000*l.* bank stock.

Banks *v.* Sladen.

Russell and Mylne, 216.

A testator gave a legacy of 12,500*l.* four per cent annuities. At the making of his will there was a stock called new four per cents, in which he had a small sum, and a stock called four per cents consolidated, of which he was a holder to a very large amount. Before the death of the testator, the latter stock was reduced to three and a half per cent: and another four per cent stock was created. The investment of the legacy is to be made in an existing four per cent stock, and not in the stock which had been reduced to three and a half per cent.

Rolls.—Feb. 18, 1830.

JOSEPH SLADEN, by his will, dated the 14th of October 1822, bequeathed as follows: "Also, I give and bequeath unto my executors, George Ralph Payne, Jarvis Joseph Sladen and John Baker Sladen, their executors and administrators, the sum of 12,500*l.* four per cent bank annuities, upon trust that they, the said George Ralph Payne, Jarvis Joseph Sladen and John Baker Sladen, or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do, immediately after my decease, stand possessed of and interested in the said sum of 12,500*l.* four per cent bank annuities, and shall and do invest the interest, dividends, and yearly proceeds of the same bank annuities, as the same shall from time to time become due, in accumulation of the capital thereof, in their own names, and during the natural life of my said daughter Sarah, the wife of the said Lawrence Banks; and from and immediately after the decease of my said daughter Sarah Banks, upon trust that they, my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do pay, assign, or transfer the said sum of 12,500*l.* four per cent bank annuities, together with all such accumulations as aforesaid, unto all and every the child and children of the body of my said daughter Sarah Banks already begotten and to be begotten, equally to be divided between them (if more than one) share and share alike; and if but one such child, then unto such only child; as and when he, she, and they shall severally and respectively attain his, her, and their age or ages of twenty-five years. And my will is, that the interest of the said bank annuities and funds of such child's part and share, who shall be under the said age of twenty-five years at the de-

cease of my said daughter Sarah Banks, shall accumulate as aforesaid, until such child's part and share of and in the said trust moneys shall become payable, and shall be then paid unto such child according to the true intent and meaning of this my will. Provided, that, in case any of the children of my said daughter Sarah Banks shall die in her lifetime leaving issue, then such issue shall take its parent's part or share of the said bank annuities, funds, and moneys, and all accumulations thereof. But in case any of the children of my said daughter Sarah shall die in her lifetime without issue, then and in such case the part or share of such of them as shall so die, shall go and be paid to, and be equally divided between and among, the survivors of the children of my said daughter Sarah, if more than one; but if only one, then to such surviving child. And in case my said daughter Sarah shall happen to die without leaving any issue of her body lawfully begotten, or there being issue, all such issues shall happen to die in her lifetime, then I give and bequeath the said 12,500*l.* bank annuities, and all accumulations thereof, unto my said sons, Joseph Sladen, John Baker Sladen, and my said daughters, Caroline Matilda Smith and Mary Sladen, equally to be divided between them, share and share alike, and to their respective executors, administrators, or assigns accordingly."

The will contained, also, a similar bequest of 10,000*l.* four per cent bank annuities upon like trusts for the testator's daughter Caroline Matilda, and her children.

The testator afterwards made two codicils, dated respectively on the 22d of October 1822, and the 17th of November 1823, which in no manner revoked or altered these bequests; and he died on the 27th of October 1827.

The testator, at the date of his will, was possessed of 59,650*l.* four per cent stock, called in the transfer papers "four per cent annuities, consolidated in 1780." By the 5 Geo. 4. c. 11, which received the royal assent on the 23d of March 1824, this stock was reduced to stock bearing only three and a half per cent interest; and any proprietor of the former stock was entitled, on signifying his assent before the 6th of April 1824, to receive, in lieu of his four per cents, an equal amount of the new three and a half per cent stock. The testator assented under the act; the whole of his old four per cents, were converted into three and a half per cents; and, at the time of his death, the sum of 76,720*l.* 19*s.* 2*d.* three and a half per cent stock was standing in his name.

At the date of his will, and time of his death, he was also possessed of the sum of 4725*l.* new four per cent annuities, which had arisen, in July 1822, from the conversion of 4500*l.* navy five per cents under the 3 Geo. 4. c. 9, and was, by the 11 Geo. 4. c. 13, reduced to three and a half per cent fund.

The 7 Geo. 4. c. 39, which received the royal assent on the 5th of May 1826, created a new four per cent stock, which was irredeemable until after the 15th of April 1833.

The suit was instituted in 1829, for the purpose, among other things, of having a sufficient part of the testator's personal estate invested in the purchase of 12,000*l.* and 10,000*l.* four per cent bank annuities in satisfaction of the two legacies.

The defendants, by their answer, stated, that there was not, at the date of the will, any stock called or known by the name of the four per cent annuities, save that stock in which the testator held the sum of 59,650*l.*

[Banks *v.* Sladen.]

and which had since been reduced to a three and a half per cent stock; and that there was not, at the then present time, any stock known or called by the name of the four per cent bank annuities; for that the only stocks which yielded a dividend of four per cent, were either the new four per cent annuities, or the four per cent annuities of 1826. Under these circumstances, they submitted, that the legacies would be well satisfied by a transfer of 12,500*l.* and 10,000*l.* three and a half per cent annuities.

The question in the cause was, in what manner and out of what stock these legacies were to be satisfied.

Mr Preston and Mr Wharry, for the plaintiffs.

These legacies are not specific bequests of portions of stock which, at the date of the will, were standing in the testator's name. They are merely general legacies, measured in quantity by a certain amount of stock bearing four per cent interest, instead of a certain number of pounds sterling. There existed at the death of the testator, and there still do exist, stocks of that denomination, and bearing that rate of interest: and the executors are bound to purchase a sufficient amount of one or other of these stocks to answer the bequests. The object of the testator was, that an income of a certain annual amount should accumulate during the lives of his daughters respectively, in order to create a fund which, at their deaths, might be a provision for their children.

The twentieth section(*a*) of the 5 Geo. 4. c. 11, providing that trusts, affecting the four per cent bank annuities thereby converted, should be satisfied by an equal amount of the new three and a half per cents, does not apply to the present case; that clause has reference only to trusts which then existed, and to the wills of testators who were then dead. Here the testator lived some years after the passing of the act.

Mr Bickersteth and Mr Hayter, contrà.

The court will look at the state of the testator's property, as it was at

(*a*) That section enacts, "that all trusts, whether created by will or otherwise, and which existed either in the whole or in part, and all directions contained in any will or devise or testamentary paper which remain unexecuted at the time of the passing of this act, as to any four per cent annuities which may under this act be converted into three and a half per cent annuities, or as to the payment or distribution of any dividends thereon, or as to the transfer of any such annuities in any events specified in any such trusts or will or testamentary paper, shall extend and be deemed and construed in all cases and in all courts of law and equity in the United Kingdom, or elsewhere in any dominions or territories belonging to his majesty, to extend and to apply to all such three and a half per cent annuities, created in lieu of any four per cent annuities, subject to or affected by any such trusts or devises or wills or testamentary papers, for all purposes, and in all cases in which such trusts, or to which any such directions can be made applicable: Provided always, that in all cases in which any proportions or parts of any such four per cent annuities are required to be transferred under any such trusts, or under the provision of or directions contained in any will, devise, or testamentary paper, or any proportion or part of any dividends arising from and out of any such four per cent annuities are required to be paid or distributed, the transfer of a like amount of three and a half per cent annuities, and the payment and distribution of dividends at the rate of three and a half per cent, instead of four per cent, upon the capitals, shall be and be deemed and taken, in all courts and for all purposes, to be a due execution of such trusts, or of the directions contained in any will or testamentary paper, and shall fully discharge the trustee or executor or executors making the same, who are hereby declared to be and are hereby fully indemnified in respect of such execution of any such trusts and executorship as aforesaid."

the date of his will, in order to ascertain his intention. Colpoys *v.* Colpoys, Jac. 451 ; Fonnereau *v.* Poyntz, 1 Bro. C. C. 472 ; Jeacock *v.* Falkener, 1 Bro. C. C. 295 ; Selwood *v.* Mildmay, 3 Ves. 306 ; Crone *v.* Odell, 1 Ball & Beattie, 449 ; The Attorney-General *v.* Scriven(*a*) ; *Doe dem.* Jersey *v.* Smith, 2 Brod. & Bing. 553. This testator, when he made these bequests, was possessed of a large sum of stock, which was accurately described by the words he used : those words could not at that time be descriptive of any other subject ; and it is impossible to doubt that what he meant to give was a portion of that subject which he had thus accurately described,—a portion of that stock which composed the principal part of his fortune. In consequence of an act of the legislature, that stock had been converted into a fund of a different denomination, and bearing a different rate of interest, so that the executors can no longer do the very thing which the will prescribes ; but the obligation imposed on them will be best and most fully satisfied by giving to the legatees that stock which the legislature has substituted for the identical subject which the testator meant to give. It is true that an equivalent for the legacies might be found in the new four per cent bank annuities ; but the testator has not directed any such stock to be purchased : the new four per cent bank annuities are not the stocks which he has given or meant to give. This will does not manifest any purpose of providing a yearly income for objects of the testator's bounty : his intention was simply to create two funds, which, at a distant time, were to be divided among the individuals who might then come within a given description.

The Master of the Rolls was of opinion, that, if the consolidated four per cent annuities had remained at the death of the testator as they were at the making of the will, the executors might have satisfied the legacy by an investment either in the new four per cents, or in the consolidated four per cents : that, the latter stock being gone, they were still at liberty to invest the legacy in the new four per cents ; and that the legatees were entitled to have the investment made in a stock bearing four per cent interest.

The decree was as follows :

" His honour doth declare that the investment of a sufficient part of the personal estate of Joseph Sladen, the testator, in the purchase of 12,000*l.* four per cent bank annuities, and 10,000*l.* four per cent bank annuities, is to be made in the fund called the new four per cent annuities."

Reg. Lib. 1829, A. 808.

Payne *v.* Low.

Russell and Mylne, 223.

DIVIDENDS, to which infants were entitled, ordered, without a reference, to be paid to their father for their maintenance; the parties being poor, and the property of small amount.

Rolls.—February 5, 1830.

(*a*) Decided by lord Eldon, but not reported.

Baker *v.* Bent.

Russell and Mylne, 224.

A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age, and a bachelor, dying without issue, is not the subject of estimate or calculation.

But the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the court, as between the vendor and purchaser, will value the contingency accordingly.

Rolls.—February 8, 1830.

THE bill was filed to set aside the sale by the plaintiff's wife and her former husband, of her reversionary interest in four undivided eleventh shares of a wharf and adjacent premises, which, at the time of the contract, were in the occupation of the defendant as tenant, and had ever since continued to be in his occupation. The relief was prayed on the ground that the purchaser had not given the fair value for the property.

The reversion, which was the subject of the sale, was expectant on the death of James Roby, who was tenant for life, and on failure of his issue male, and was to be reduced to less than the four-eleventh shares, in the event of his leaving issue female, or of there being issue of his sister Elizabeth Roby. In 1817, James Roby was unmarried, and had no issue, and was sixty-three years of age. His sister, also, who was only four years younger, had no issue, and was unmarried.

The female plaintiff was at that time the wife of a person who had been a writing clerk in a solicitor's office, but, in consequence of the loss of sight, had been for some time without any regular means of livelihood; and she and her family were in extreme distress. In March 1817, a proposal on her behalf was made to the defendant, to purchase her reversionary interest; and he, after some correspondence, agreed to give 550*l.* for it. This treaty proceeded on the supposition that the reversion was not subject to any contingency, but was to take effect absolutely on the death of the tenant for life. In July 1817, the abstract of title was delivered; and, the mistake as to the nature of the interest being discovered, the defendant stated, that, in consequence of the contingency to which the reversion was subject, he should give only one half of the sum he had before offered. On the 2d of August the agreement was signed, fixing the price at 275*l.*; and it was shortly afterwards carried into effect.

Elizabeth Roby died in 1821; James Roby, the tenant for life, died in 1822; and the reversion then fell into possession.

The present bill was not filed till 1828; but, in the intervening period, many applications had been made to the defendant to give up his purchase.

In 1817, the defendant occupied the entirety of the premises at a rent of 220*l.* 16*s.*, which was at the rate of 80*l.* 6*s.* for four-elevenths. In the negotiation for the purchase, his solicitor, in a letter written by his request to the plaintiff's agent, stated the proportion of the rent paid for four-elevenths to be only 70*l.* But the bill did not charge that, in the treaty, there had been any misrepresentation of the rental. On the death of the tenant for life in 1822, the defendant took a new lease of the other undi-

vided shares of the premises, at a yearly rent which was at the rate of about 152*l.* for four-elevenths. But he alleged by his answer, that he was induced, by local and personal circumstances, to give for the shares not purchased by him a rent exceeding the actual value.

Several witnesses were examined as to the value of the reversionary interest in the premises, subject to the contingency; and all agreed in representing it as greatly more than the price which had been paid. Putting aside the contingency of issue of the tenant for life or his sister, the reversion of the plaintiff's four-elevenths was estimated as worth, in 1817, about 2600*l.*

Mr Pemberton and Mr Moore, for the plaintiff.

It is the settled law of the court, that the purchase of a reversion cannot be sustained, unless the purchaser shows that he gave the full value for it. Gowland *v.* De Faria, 17 Ves. 20; Hinchsman *v.* Smith, 3 Russ. 433. Here, not only has the purchaser failed to prove that he has given the full value, but the negative is clearly made out. In fact, for 275*l.*, paid partly in 1817 and partly in 1818, he acquired, from 1822, the absolute fee of property worth upwards of 150*l.* a year. The mere statement of the transaction shows that it comes within the class of contracts which this court will not permit to stand.

Besides, it is clear that advantage was taken of the distressed situation of the vendors, and their want of accurate information concerning the value of the property. In the negotiation, the solicitor of the defendant represented to them that the rent paid for the share of the premises to which their interest extended was only 70*l.* a year; and the contract must have proceeded on their belief that his representation was true. In fact, the proportion of the rent for the four-elevenths was upwards of 80*l.* Thus, a reversion of 80*l.* a year was sold under a notion, infused by the purchaser into the mind of the vendor, that it was a reversion of only 70*l.* Such a misrepresentation affords, in itself, a sufficient ground for setting the sale aside.

Mr Bickersteth and Mr Beames, for the defendant.

The bill does not allege that there was any misrepresentation by the defendant, or that the vendor was ignorant of the actual amount of the rent: in fact, she had in her possession a copy of an answer filed in 1814 by the tenant for life to a bill in chancery, in which the rent paid by Bent was accurately stated.

The ordinary principle cannot be applied to a case like this, because it is impossible to estimate the value of the contingency on which the reversion was expectant. The value of a reversion, to take effect on the death of a person of a given age, is a matter of calculation; but there is no arithmetic, which can estimate the probability, whether a certain individual will marry or not, and whether, if he marries, he will have issue. The court cannot set a value on such a contingency; and, therefore, it cannot interfere with the transaction, on the ground that the full value was not paid.

Mr Pemberton, in reply..

There is no authority which says, that the general rule with respect to the sale of reversions does not apply to reversions expectant on failure of issue of this or that person. In an unreported case of Whichcote *v.* Graham, the sale of such a reversion was impeached, on the ground that the full value was not given for it. The Master, to whom a reference on the

subject of the value was directed, reported that it was worth a certain sum, which was very little, though somewhat, below the price actually paid. The court, deeming the difference too inconsiderable to bring the case within the rule, refused to set aside the transaction; and, on an appeal, the decree was affirmed by the present Lord Chancellor: but no person attempted to say that the doctrine of under value was not applicable to a dealing for a reversion expectant on a failure of issue(*a*). There is, no doubt, more difficulty in estimating the value of such reversions, than where the contingency is mere matter of arithmetical computation: but, still, they are bought and sold; their value is estimated *de facto*, and is, therefore, capable of estimate. In the present case the court has no occasion to perplex itself as to the value of the contingency, so far as that value depended on the possibility of the existence of such issue as would exclude the reversioner; for the plaintiff has himself furnished the rule by which that contingency is to be estimated. When he considered the reversion to be a reversion certain, expectant on the death of James Roby, he was willing to give 550*l.*; when he discovered the contingency to which the interest was subject, he reduced his offer to one-half of that sum. We have, therefore, his admission, that the contingent reversion was worth one-half of what would have been its fair price, if it had been an absolute reversion, expectant on the death of James Roby. The value of the absolute reversion is a matter of strict calculation; and, consequently, the value of the contingent reversion, at least as against this defendant, may be ascertained accurately.

Besides, even if it were impossible to ascertain the value of a reversion dependent on a particular contingency, it might nevertheless be shown that it was sold, and must have been sold, for less than it was fairly worth. Admit that no computation can be made of the fair price of a reversion of 80*l.* a year, expectant on the death of James Roby and of his sister without issue, still it is certain that such a reversion must be worth more than a similar reversion of 70*l.* a year, and worth less than a similar reversion of 150*l.* a year. Now, the sale proceeded on the supposition that the rent of four-elevenths of the premises was 70*l.* a year, when, in fact, it was 80*l.* a year. And even if the vendor had been aware that the rent paid under the existing lease was at the rate of 80*l.* a year, he would not have been treating on the basis of the fair value of the property; for, within five years from the date of the contract, the defendant took a lease of other undivided shares of the premises, at a rent which was nearly double of that rate. It is impossible, therefore, that a fair price could have been given for this reversion, because the treaty proceeded upon an estimate of the yearly value of the property which was far below the truth.

The Master of the Rolls. The probability that a bachelor of sixty-three will marry and have issue, depending upon the peculiar habits and

(*a*) In Henley *v.* Axe, 2 Bro. C. C. 17, and 2 Swans. 141, n., the bill was filed to set aside the sale of a reversionary interest expectant on the decease of the plaintiffs' uncle without issue. On the application of the defendants, and with the consent of the plaintiffs, a reference as to the adequacy of the consideration was directed; the Master reported in favour of the defendants; and, exceptions to the report being overruled, the bill was finally dismissed. See also Ex parte Tindal in the matter of Gibbins, (Montagu and Macarthur, 415) and Ex parte Eagle in the matter of Gibbins, (Montagu and Macarthur, 422.)

disposition of the party, and the accidents of life, is not the subject of estimate or calculation; and I put out of my consideration all evidence which affects to set a value on that contingency.

The plaintiffs have not in their bill alleged that there was any misrepresentation with respect to the rental. If it had been alleged, the defendant might have explained and disproved it. I cannot, therefore, infer misrepresentation merely from the expression used in the letter of the defendant's agent.

It appears that, on the death of the tenant for life in 1822, the defendant agreed to pay the other proprietors a rent for their shares at the rate of 150*l.* for four-elevenths. He asserts that this was much more than the actual market value, and it may have been so; but it certainly affords a presumption, that, at the time of the contract, the premises were worth more than the existing rent of 220*l.*, and affords a strong ground for an inquiry, what was the value of the reversion of the female plaintiff at the time of the agreement? I mean the value of the reversion without regard to the contingency; for though, generally speaking, such a contingency, as I have already stated, is not the subject of estimate or calculation, yet, in this particular case, the defendant has himself furnished a rule by which to estimate that contingency. At the beginning of the treaty, the defendant was not aware that such a contingency existed, and he put a value upon the plaintiff's share, as if the reversion was certainly to take effect upon the death of the tenant for life. When he afterwards discovered the contingency, he proposed to deduct one half of the sum he had just offered; and that proposal was ultimately the basis of the agreement. He was well acquainted with the tenant for life, who was his landlord; and, his proposal admitting that, under all the circumstances, one half of the value of the reversion was a fair deduction in respect of the contingency, he cannot complain that the court adopts the rule which governed his own conduct in the treaty.

Upon the whole, therefore, I think the justice of the case will be reached by refering it to the Master to inquire and state what was the value of four-elevenths of the reversion at the time of the agreement, supposing it had been to take effect certainly at the death of the tenant for life, and by declaring that one half of such value is to be deducted in respect of the contingency.

In this case, five years elapsed after the agreement, and before the death of the tenant for life, without issue, and no complaint was made on the part of the plaintiffs, who appear not to have disputed the contract, until the contingency happened in their favour. I give no costs, therefore, to the hearing; and shall reserve the consideration of further directions and subsequent costs, until after the Master shall have made his report.

Dove *v.* Everard.

Russell and Mylne, 231.

If one of two persons named trustees and executors disclaims and renounces, and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate.

Rolls.—Feb. 11, 1830.

THE testator, who was a farmer, appointed Everard and Manby his trustees and executors. At a meeting of the family, held immediately after the testator's death, Everard stated, that, as he was a creditor of the deceased, he had better not act, and it was agreed that the opinion of counsel should be taken on the point. Counsel advised him not to act; and, on the 21st of February, he executed a deed of disclaimer as to the real estate, and renounced probate in the ecclesiastical court. However, as Manby, who alone proved the will, was unacquainted with the management of farming stock, or with its value, Everard took an active part in the conversion of the assets into money: but he stated, that he did so merely as the agent of Manby; and that he paid to him, or applied according to his direction, and accounted to him for, all the moneys which had thus come into his hands.

Under these circumstances Everard had been made a party defendant to a suit for the administration of the assets; and the question was, whether he was a necessary or proper party.

Mr Treslove and Mr Skirrow, for the plaintiff, cited Read *v.* Truelove, Ambler, 417, and contended, that Everard, having possessed himself of the assets, became accountable as executor and trustee, notwithstanding his disclaimer and renunciation, and that it was not competent to him to refer his possession to his supposed delegated character of agent.

Mr Bickersteth and Mr Rolfe, contrà, submitted, that Everard had intermeddled with the assets only as the agent of Manby, to whom alone he was accountable, and not to Manby's *cestui que trust.*

The Master of the Rolls was of opinion that Everard had not acted as trustee and executor; and that he ought not to have been made a party. The bill was therefore dismissed as against him, with costs.

Fowler *v.* Garlike.

Russell and Mylne, 232.

Where the trust is too vague for the court to execute, the next of kin are entitled.

A testatrix bequeaths the residue of her property to her executors, upon trust to dispose of the same at such times and for such purposes as they should think fit; it being her intention that the distribution thereof should be left entirely to their discretion: Held, that the executors were trustees of the residue of the property for the next of kin of the testatrix.

Rolls.—Feb. 16, 1830.

SARAH HATRELL, after bequeathing to Bennett Garlike 300 guineas, and to Thomas Browne 100 guineas, and giving legacies to various persons who were distantly related to her, disposed of the residue of her property in the following manner: "And whereas I have the power to dispose by will of the sum of 2000*l.*, which my executors will be entitled at my decease to receive from the executors of Mr Thomas Hatrell of Newcastle-under-Lyne; now I do hereby direct that the annual interest or dividends thereof shall be paid and applied, at the discretion of my executors, to and for the use of my sister, Mrs Dorothy Hatrell, during her life; and as to the said principal sum of 2000*l.* (subject to such of my said sister's life-interest therein), and all and singular other my estate and effects whatsoever and wheresoever, real and personal, not hereinbefore disposed of, and every part, share, or interest therein respectively, of or to which I now am, or at the time of or immediately before my decease shall be, possessed or entitled, in possession, expectancy, or otherwise howsoever, or whereof I have the power to dispose in any wise, I give, devise, and bequeath, limit, appoint, and dispose of the same and every parcel thereof respectively, to the said William Bennett Garlike and Rev. Thomas Browne, to hold to them, their heirs, executors, and administrators, according to the nature and tenure of such property, upon trust to dispose of the same at such times and in such manner, and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion." She then appointed Garlike and Browne her executors, empowering her said trustees and executors to convert all her property into money, and to invest the proceeds on securities, which they were to vary at pleasure, and directing that each should be accountable only for his own receipts.

The bill was filed by persons to whom legacies had been given, claiming to be entitled beneficially, as next of kin of the testatrix, to the residue of her property.

Mr Tinney and Mr Skirrow, for the plaintiffs.

It is evident from the language of the will that Garlike and Browne were not to take the residue beneficially; they were to be trustees for some person or other, and for some purpose or another: but who those persons are, or what that purpose is, the testatrix has not explained. The objects of the trust being thus left uncertain, the residue must be considered as not disposed of, and will go to the next of kin. Vezey *v.* Jamson, 1 Sim. & Stu. 69; Morice *v.* The Bishop of Durham, 9 Ves. 399, 10 Ves. 522; James *v.* Allen, 3 Mer. 17.

Mr Bickersteth and Mr Turner, for the defendants, in the same interest.
Mr Pemberton and Mr Chandless, for Garlike and Browne.

In the cases cited, some object of benevolence or charity was pointed out distinctly. Here, to use the words of sir William Grant, in Gibbs *v.* Rumsey, 2 Ves. & B. 297, we have "nothing but a purely arbitrary power of disposition, according to a discretion which no court can either direct or control." "It is not to be contended," adds that great judge, "that if the words were, 'to be disposed of according to their discretion,' that would have qualified the preceding gift." This is almost in terms the case which sir W. Grant contemplated.

The words of the bequest give the absolute beneficial interest to the executors: they are to dispose of the residue for such uses as they shall think fit; the distribution of it is left entirely to their discretion. Such powers amount to a complete right of property, and words so express must exclude any trust for the next of kin. What is there to hinder a testator from giving his property to such persons or person as a certain individual shall think fit to select? Gibbs *v.* Rumsey, 2 Ves. & B. 298.

However, if it be considered that there is in this will enough to indicate an intention that the executors were to apply the property to purposes of charity and benevolence, they will be most ready to concur in such an employment of the funds either under the direction of the court or in the exercise of their own discretion.

The Master of the Rolls was of opinion that this was a plain trust, but too uncertain for a court to execute, and declared the next of kin entitled to the residuary estate.

Watson *v.* Reid.

Russell and Mylne, 236.

The plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance till about a year afterwards: the bill was dismissed on the ground of unreasonable delay.

Rolls.—Feb. 18, 1830.

IN June 1826, the defendant entered into a contract to purchase some houses from the plaintiff. An abstract was delivered; and a correspondence with respect to the title took place. But, on the 7th of April 1827, the defendant gave notice to the vendor that he objected to the title, and abandoned the contract; and, on the 1st of May following, he demanded a return of his deposit. The plaintiff refused to return the deposit, but did not take any steps to enforce the contract until the 25th of April 1828, when he filed his bill for a specific performance.

Mr Hayter, for the defendant, submitted, that a vendor, who, after the purchaser had given notice that he abandoned the contract, allowed so long a period to elapse without taking any step to enforce performance, was not entitled to the assistance of a court of equity, and ought to be left to his remedy at law. The inactivity of the vendor might further be

considered as acquiescence in the abandonment of the contract: and the situation of the purchaser might have been materially different, if the attempt to compel the performance of the contract had been made without delay.

Mr Preston and Mr Ching, contrà.

It is of course that there should be a reference of the title to the Master. Never till now was it suggested, that a vendor, who, instead of rushing instantly into a suit, waited for nine or ten months before he took that step, thereby lost his right to the assistance of a court of equity. As the vendor was always ready and willing to perform the contract, and to make a good title to the premises, the notice of abandonment was of no avail. Delay may with more reason be imputed to the purchaser, who has not attempted to enforce the return of his deposit, than to the vendor, who allowed a year to elapse before he filed his bill.

The MASTER of the ROLLS dismissed the bill with costs, on the ground of unreasonable delay in filing it.

Barton *v.* Tattersall.

Russell and Mylne, 237.

A person, who had taken the benefit of the act for the relief of insolvent debtors, first in 1814, and a second time in 1820, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency:

Held, that the assets ought to be applied in payment first of these subsequent debts; and, secondly, of the debts scheduled under the second insolvency; and, thirdly, of the debts scheduled under the first insolvency:

That a court of equity had jurisdiction so to administer the fund: and

That the right of the creditors to such relief was not affected by the statute of limitations.

Rolls.—Feb. 15, 23, 1830.

ON the 14th of September 1814, Philip Jacobs took the benefit of the act then in force for the relief of insolvent debtors, and was discharged by the insolvent debtors' court. The schedule, which on that occasion was annexed to his petition, enumerated debts due to sixty-seven different creditors, and amounting in the whole to 2280*l.*, and specified assets amounting to between 3*l.* and 4*l.* only. The usual assignment to the provisional assignee was executed.

On the 22d of February 1820, Jacobs was again discharged under the acts for the relief of insolvent debtors, entered into the requisite recognizance, and executed the usual assignment to the provisional assignee. The debts scheduled on that occasion amounted to nearly 1000*l.*, and the assets to about 14*l.* He subsequently acquired considerable property, but paid none of the debts contracted previously to either of his insolvencies; and he died on the 4th of December 1826, leaving assets of such an amount, that there would remain a considerable surplus, after all his debts, incurred since the 22d of February 1820, were satisfied.

The plaintiff was a creditor of Jacobs under each of the insolvencies, and under each of them had been appointed assignee of his estate in trust

for the creditors. The bill was filed against Jacob's executor, in order to have the surplus of the assets, after payment of the debts contracted by Jacobs since his last discharge, applied towards the satisfaction of the debts set forth in the schedules of the insolvent.

Mr Pemberton and Mr Parker, for the bill.

The 53 Geo. 3. c. 102, created the court for the relief of insolvent debtors: and, by the tenth section, the court is directed to order an engagement to be executed by the petitioner, seeking the benefit of the act, "to pay so much of the just debts and demands of the several persons against whom such prisoner shall by such court be adjudged entitled to the benefit of this act, as shall not be paid out of the estate and effects to be conveyed and assigned by such prisoner for such purpose, in case he or she shall at any time thereafter be enabled to pay such debts and demands, or to pay such part or parts thereof as he or she shall be able at any time to pay, &c.; and judgment shall thereupon be entered in such court against such prisoner, in pursuance of such engagement, which judgment shall and may, if the court shall so order, be executed against the future estate and effects of such prisoner, real and personal, as such court shall direct, and shall bind the assets of such prisoner, real and personal, in the hands of his heirs, executors, and administrators, for the full amount of the debts and demands aforesaid which shall remain unsatisfied, or so much of such debts and demands as the said court shall be of opinion ought to be satisfied, and execution shall be had upon such judgment in such and the same manner as execution may be had upon a judgment in the court of king's bench." This clause keeps the debt in full force against the assets of the debtors; and the creditor must have the same remedies against the assets, as if the debtor had not been discharged from his personal liability. The 54 Geo. 3. c. 23, which came into operation on the 10th of December 1813, was passed in order to amend the preceding act; and the fourteenth section, after repealing the clause which required the prisoner to execute an engagement, enacts, that, "instead thereof, the court shall require such prisoner to enter into a recognizance to the king's majesty for the full amount of such debts; and it shall be lawful for any creditor or creditors of such prisoner from time to time to apply to the said court to have such recognizance put in suit, and the same shall be put in suit in pursuance of the order of the said court for that purpose," &c.

It is clear that the statute of limitations cannot run against the scheduled creditors of an insolvent who is discharged under these acts. The person of the debtor is protected; but his property, however remote the time at which it may be acquired, continues liable to answer the demands of his creditors. The mere existence of the judgment, as a security for all the creditors, would prevent their debts from being barred. The act professes indeed to give a particular remedy against the debtor's property; but that remedy has been found practically altogether insufficient. The present plaintiff has applied to the insolvent debtors' court, and obtained every assistance it could give; but that assistance has been found to be totally ineffectual for any useful purpose. He stands, therefore, in the situation of a person who, in common with the other creditors of the deceased, has a legal claim against the assets, and he has a right to have effect given to that claim by the administration of the assets in this court.

Mr Bickersteth and Mr Merivale, contrà.

The debts of the creditors, for whose benefit this suit was instituted,

would have been bound by the statute of limitations, if the debtor had not taken the benefit of the insolvent acts. The question then is, what is there in the provisions of the insolvent acts to put the creditor in a better situation, than if insolvency had not occurred? He is deprived of his remedy against the person; his remedies against the property of the debtor remain. But what is there to prolong the duration of those remedies? The 52 Geo. 3. c. 165, s. 54, declares, "that nothing therein contained should be deemed or taken to discharge the future estate or effects, real or personal, of any person or persons discharged under the act, and that all and every person or persons entitled to receive or be paid any such debts, damages, costs, sum or sums of money, should have all such and the like remedies in law and equity against such future estate and effects, other than and except the necessary apparel and bedding of such person or persons and their family, and the necessary tools for his, her, or their trade and occupation, not exceeding the value of 40*l*., but not against the person of the party for payment thereof, as he, she, or they might have had, if that act had not been made." The principle of the act, as to the insolvent, seems to be, that the creditor is to have the same right to payment out of the future assets of the debtor, as if the insolvency had not occurred; why then should the lapse of time fail to have its usual operation? No argument in favour of the plaintiff's claim can be raised from the subsequent statutes of 1 Geo. 4. c. 119; 3 Geo. 4. c. 123; 5 Geo. 4. and 6 Geo. 4. c. 121; and the 7 Geo. 4. c. 57, furnishes an inference against him. That act, seeking to remedy the defective state of the law, requires the insolvent to execute a warrant of attorney, on which a judgment for the amount of the debts stated in the schedule is to be entered up in one of the superior courts at Westminster; "Sect. 57. And if at any time it shall appear to the satisfaction of the said court, that such prisoner is of ability to pay such debts, or any part thereof, or that he or she is dead, leaving assets for that purpose, the said court may permit execution to be taken out upon such judgment for such sum of money, as, under all the circumstances of the case, the said court shall order; such sum to be distributed rateably amongst the creditors of such prisoner, according to the mode hereinbefore directed in case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said court shall think fit to award; and no *scire facias* shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the said court." This special proviso shows that the framers of the act considered it necessary to guard expressly against the lapse of time.

Besides, it would appear, that the rights, which are reserved to creditors against the future property of the insolvent, are not absolute; they are to be exercised through the instrumentality of the insolvent debtors' court, and are to be subject to its discretion. In intermeddling with such matters, and in assuming to itself power to regulate or administer the rights or remedies created by these statutes, a court of equity seems to be stepping out of its proper sphere.

Feb. 23.—The Master of the Rolls. By the several acts for the relief of insolvent debtors, if the assets of the insolvent are at the time of

his death more than sufficient to pay his subsequently contracted debts, they shall go in discharge of the debts from which he was relieved by the insolvent acts : and a particular mode is prescribed in which the benefit of that provision is to be obtained. That mode has not been followed in the present case ; and the question is, whether a court of equity has authority to administer the assets in discharge of those debts. I am of opinion that it has such authority.

The insolvent here had twice taken the benefit of the acts ; and it appears to me that the order of payment must be, to pay *last* the creditors who claim under the *first* insolvency.

I do not consider the lapse of time as of the least importance : for here the liability arises in respect, not of a promise, but of a lien created by the statute.

" His honour doth declare, that the surplus assets of the testator Philip Jacobs, after payment of his funeral and testamentary expenses, and debts since his last insolvency, are applicable, first, to the payment of the debts under the second insolvency, and then in the payment of his debts under the first insolvency," &c.

Reg. Lib. 1829, A. 1111.

Attorney-General *v.* Ackland.

Russell and Mylne, 243.

If a trustee, to whom a legacy is bequeathed upon trust to purchase lands for charitable purposes, receives the money and lays it out in lands, which are conveyed to him upon the trusts expressed in the will, the trust thus executed is contrary to the mortmain act, and will not be carried into effect by the court.

Rolls.—Feb. 24, 1830.

A TESTATOR left a sum of money upon trust, to be laid out in lands for charitable purposes. The trustee of the legacy received the money and with it bought lands, of which he took a conveyance to himself upon the trusts expressed in the will.

The question in the suit was, whether, as the trustee had taken a conveyance of the lands in trust for a charitable purpose, the court would not execute the trust thus created, though it would not have given effect originally to a bequest which was contrary to the mortmain act.

Mr Pemberton, for the information.

Mr Bickersteth and Mr Beames, contrà.

The MASTER of the ROLLS held, that a trustee could not, by so acting, give effect indirectly to a bequest which was contrary to the mortmain act.

Johnson *v.* Telford.

Russell and Mylne, 244.

An heir is not put to his election between a Scotch estate and benefits given to him by a will, by the force of mere general expressions: especially if the uses of the will are not applicable to Scotch property.

An heir is not to be disinherited by ambiguous expressions.

A testator, by a codicil, reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon the trusts expressed in his will, and directed that, if any hereditaments purchased by him at any time or times should happen to be conveyed after the date and publishing thereof, his heir-at-law, or other real representatives, and every other person in whom the same should be vested, should, forthwith upon his decease, convey and assure the same to his trustees upon the trusts of his will: he purchased other estates afterwards: Held, that, as to the subsequently purchased estates, a case of election was not raised against the heir taking benefits under the will.

Rolls.—Feb. 25, 1830.

JOHN SIMPSON, by his will, dated the 12th of August 1807, gave, devised and bequeathed, limited, and appointed all and every his real and personal estate, whatsoever and wheresoever, which he, or any person in trust for him, were or was, or should be seised or possessed of, or entitled to, in possession, reversion, remainder or expectancy, and all his estate or interest therein, subject to the payment of his debts, funeral expenses, and certain annuities and legacies, unto and to the use of Thomas Telford and Joseph Loxdale, their heirs, executors, administrators and assigns, upon trust that they, and the survivor of them, his heirs, executors, administrators and assigns, should, during the joint lives of his the testator's two daughters, Jane Johnson and Mary Ann Newton, pay the interest, dividends, and annual produce of all his said real and personal estate and effects, into the hands of his two daughters, in equal shares and proportions, for their respective sole and separate use; and that, from and immediately after the decease of his daughters respectively, they should stand seised and possessed of his real and personal estate and effects, upon certain trusts for the benefit of the children of Jane Johnson and Mary Ann Newton, and their issue; with limitations over, in default of issue of the daughters. The will, also, gave the trustees power to sell the real estate, and authorized them, during the life of the testator's daughters, to revoke all the limitations to them and their issue, and to declare in what other manner they, the trustees, or the survivor of them, or the heirs, executors, administrators or assigns of such survivor, should stand seised and possessed thereof, for the benefit of his two daughters, their husbands and issue.

The testator made a codicil, dated the 26th of May 1811, which contained the following clause:

"Whereas I have, since the publishing of my last will and testament, purchased certain freehold estates in and near the Castle Foregate, in the town of Shrewsbury," &c., "now, I do hereby give and devise, direct, limit and appoint the same estates and premises, with the hereditaments and appurtenances, unto and to the use of Thomas Telford and Joseph Loxdale, their heirs and assigns for ever, upon the trusts, and to and for the intents and purposes expressed and contained in my will, of and con-

[Johnson *v.* Telford.]

cerning my other freehold estates devised by me to them in my said will: and if it shall happen that any hereditaments purchased by me at any time or times, should happen to be conveyed after the date and publishing hereof, then I direct and appoint, that my heir-at-law or other real representatives, and every other person in whom the same shall be vested, shall forthwith, upon my decease, convey and assure the same unto and to the use of Thomas Telford and Joseph Loxdale, their heirs and assigns for ever, upon the trusts, and for the intents and purposes contained in my will, of and concerning my real estate devised to them by my said will."

The testator, at the time of his death, was seised of real estates in Scotland, of which he had acquired some before the date of his will, and others subsequently. After the date of the codicil he purchased freehold and copyhold lands in England, which were duly conveyed to him.

Jane Johnson and Mary Ann Newton were the co-heiresses of the testator, according to the laws both of England and of Scotland, and according to the customs of the manors of which his copyholds were holden. The bill was filed by their children, praying a declaration that the co-heiresses, Jane Johnson and Mary Ann Newton, were bound to elect either to give effect to the will and codicil as to the heritable estates in Scotland, and to the codicil as to the subsequently purchased freehold and copyhold lands in England, or to lose the benefits given them by the will.

There were two questions in the cause:

First, Whether the daughters were put to their election between the Scotch estates and the benefits given to them by the will; and,

Secondly, Whether, if they claimed the benefits given them by the will, they were bound to convey the estates purchased after the date of the codicil to the uses of the will.

Mr Tinney and Mr Barber, for the plaintiffs.
Mr Temple, for the trustees.
Mr Treslove and Mr James Wilson, for the co-heiresses.

On the first point, it was argued on behalf of the plaintiffs, that the decision of Sir William Grant, in Brodie *v.* Barry, 2 Ves. & B. 127, established, that an English will, though inoperative to pass real estates in Scotland, was sufficient to raise a case of election against a Scotch heir who took benefit under it. In this case, as in that, the will and codicil, as testamentary instruments, had no operation on the Scotch estates; but they manifested a clear intention to subject the whole of the testator's property, wherever it might be situate, to the same series of trusts. This intention would be in part defeated, if the co-heiresses were to take the fee of the lands in Scotland; and they could not be allowed to defeat some of the dispositions contained in the will, and at the same time to enjoy the benefits which it gave them.

On the second point, Thellusson *v.* Woodford, 13 Ves. 209; 1 Dow. 249, was cited, to show that an heir might be put to elect between the benefits given him by the will and lands purchased after the date of it. The only question, therefore, was, whether, in the present case, the testator had manifested an intention to dispose of the after-purchased lands. Now, the codicil contained, first, an express devise of the freeholds at Shrewsbury, which, though purchased, had not been conveyed to him: and he next directed, that, "if it shall happen that any hereditaments, purchased by him at any time or times, should happen to be conveyed

after the date of the codicil," those hereditaments should upon his decease be conveyed to his trustees, upon the trusts expressed in his will. This last proviso was general in its expression : it extended to all hereditaments purchased by him at any time, and would, therefore, include subsequently acquired lands ; and it could not have been inserted with a view merely to the freeholds in Shrewsbury, for those had been expressly devised by the preceding clause.

For the co-heiresses, it was said, that in the will no mention was made, and no notice was taken of the Scotch estates. The words were such as a testator, disposing only of land in England, would have used ; and there was no reason for extending them to such hereditaments as were not the proper subject of testamentary disposition. The nature of the limitations, too, seemed to show that the testator had in his contemplation only lands in England. In Brodie *v.* Barry, the Scotch estates were specified in the devise.

The codicil appeared to have been made in order to pass the freeholds which the testator had purchased in Shrewsbury. For this purpose the testator devised them to his trustees ; and, as that devise would pass only an equitable interest, and as it might have been revoked by a subsequent conveyance of the legal fee(*a*), if that conveyance were not unqualified, he added a direction that the person in whom any interest which might be conveyed to him should become vested, should assure the same to his trustees.

The Master of the Rolls. In the case of Brodie *v.* Barry, the Scotch estate was mentioned in the will, and expressly intended by the testator to pass thereby. In this will no notice whatever is taken of the Scotch estate ; and the question is, whether it is clearly to be collected, from the general words used, that the testator meant to pass his Scotch estate to the uses of his will. Where a testator uses only general words, it is to be intended that he means these general words to be applied to such property as will, in its nature, pass by his will, and to the uses therein expressed. His will cannot affect his Scotch estates, and some of the uses expressed in his will cannot be applied to Scotch property. I am of opinion, therefore, that the co-heirs are not put to elect between the Scotch estate and the benefits given to them by the will.

With respect to the question on the codicil, the expressions used are not sufficiently certain to exclude the co-heirs from the descended estates which were purchased after the codicil. The language used in the codicil does not refer to estates purchased after the codicil, but to estates which shall happen to be conveyed after the codicil ; and I cannot, as against the co-heirs at law, extend the testator's meaning beyond the natural force of his expressions.

(*a*) Ward *v.* Moore, 4 Mad. 868.

Churchman *v.* Ireland(*a*).

Russell and Mylne, 250.

A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will: and therefore the heir, taking benefits under the will, must elect.

December 13, 14, 20, 1831.

THOMAS IRELAND, by will bearing date the 18th of May 1820, and duly executed and attested, gave, devised and bequeathed "all and singular my estate and effects whatsoever and wheresoever, and of what nature or kind soever, both real and personal, which I shall die possessed of, interested in, or entitled unto," to three trustees, their heirs, executors, administrators and assigns, upon trust, to apply a portion of the rents, interest and dividends towards the support of the testator's son John, and subject to the payment of certain other sums, upon trust, to invest the residue of such rents, &c. in government or other good securities, and after the death of his said son, to sell and dispose of all his (the testator's) then real and personal estate, and to distribute one-third part of the moneys arising from such sale among all the children of his said son, and to pay and apply the other two-thirds in manner therein mentioned.

In the year 1824, the testator purchased a field adjoining to his other estate: and, in the month of July 1827, he died, leaving the defendant Thomas Ireland, the eldest son of his son John (who died in the testator's lifetime), his heir at law. The bill prayed, among other things, that, in respect of the property acquired subsequently to the execution of the will, the heir at law, who was one of the legatees, might be put to his election.

The Vice-Chancellor having decided that the heir was bound to elect, an appeal was now brought from that decision.

Mr Tinney and Mr Bagshawe, for the heir at law, cited Back *v.* Kett, Jac. 534; Thellusson *v.* Woodford, 13 Ves. 209, 1 Dow, 249.

Sir Edward Sugden and Mr Jacob, contrà, referred to Blunt *v.* Clitherow, 10 Ves. 589.

Mr Tinney, in reply.

Dec. 20.—The Lord Chancellor (lord Brougham). In this case, it was contended that the words must be understood not as looking forward to the whole of the lands which the testator might possess at his decease, including the property he might acquire after the execution of his will, but as referring to such estates only as he was possessed of at the time when the will was made, and which should continue in his possession down till the period of his death: that when a person in his will says, "all my estates which I shall die possessed of," it is the same thing as if

(*a*) This case is inserted here in consequence of the connexion of the point decided in it with that which was discussed in Johnson *v.* Telford.

he had said, "all my estates, which, being now mine, shall be mine till my decease;" in other words, "all that estate on which my will can operate." I must admit that the case of Back *v.* Kett goes a certain way in support of that position: nor can I altogether reconcile the judgment there given with the prior case of Thellusson *v.* Woodford, which, if Back *v.* Kett be to stand at law, is certainly considerably broken in upon by the decision of sir T. Plumer. Thellusson *v.* Woodford is referred to by his honour in terms of considerable doubt and hesitation, in a manner clearly showing, that, had it originally fallen to him to decide it, he would have come to a different conclusion. Nevertheless, Thellusson *v.* Woodford is a case of the highest authority; especially valuable for the clear and able manner in which the argument is put in the judgment of lord Erskine, who did not deliver his opinion till he had given the fullest deliberation to the question, and taken great pains to satisfy his mind. His lordship states his reasons with his usual distinctness: they are such as to carry complete conviction with them; and at all events they have since received the sanction of the house of lords.

I cannot, therefore, see the least foundation for the doubt attempted to be cast upon that case; and although, perhaps, Thellusson *v.* Woodford is not in necessary contrast with Back *v.* Kett, although the two cases may even by possibility stand together, inasmuch as in the former, the words may be said to evidence more strongly an intention to deal with after-purchased property, certainly the doctrine laid down in that case is inconsistent with Back *v.* Kett, and with the argument urged at the bar in support of this appeal.

This will, therefore, raises a case of implied condition, and the heir is bound to elect. The judgment of the Vice-Chancellor must be affirmed; but, considering how closely Back *v.* Kett resembles the present case, I shall affirm the decree without costs.

Jones *v.* Scott.

Russell and Mylne, 255.

A trust for the payment of debts in a will of personal estate will prevent the operation of the statute of limitations.

That notice in a newspaper by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the statute of limitations. *Semble.*

But *semble*, a debt is not taken out of the statute of limitations by an advertisement published by the administrator, requesting all persons, having claims on the estate, to send in statements of their demand, prior to their being laid before A. B., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient.

Feb. 26, 1830.

IN November 1815, Richard Donovan, Esq., barrister at law, made his will, not dated, but executed and attested in such a manner as to pass freehold estates by devise; and thereby, after reciting, amongst other things, that he was seised in fee of an estate at Tibberton, he gave and devised all his real estates at Tibberton, or elsewhere in England, and all his personal estates in England, or in the West Indies, or elsewhere, of every kind,

unto and to the use of Thomas Rodie and William Montague, and their heirs, executors, and administrators, upon trust to collect and get in all his personal estate, and pay his debts thereout, if the same should be enough for that purpose; and as to his estate called Tibberton Court, and every part thereof, except the advowson of Tibberton, upon trust to let the same ready furnished, and to pay the proceeds thereof in the manner following, that is to say, the sum of 150*l.* per annum to his wife, Caroline Elizabeth Donovan, being the interest of 3000*l.*, part of her settlement, which was vested in the purchase of the Tibberton Court estate, and as to the remainder thereof, in trust to pay the same to his daughter Caroline Anne Donovan during her life, her receipt alone to be a sufficient discharge; and in case his personal estate should be enough to pay his debts, without having recourse to selling his wine, linen, plate, and books, then he gave his wine and linen to his wife, absolutely, for her own use; but in case his personal estate should not be enough to pay off and discharge his debts, then he directed his trustees to sell all his personal estate of every kind, except his linen, which he gave to his wife as before, and also to sell the next presentation to the rectory of Tibberton, to enable them to pay off all his debts; and in case his debts could not be paid off and discharged from all his personal estate, then he directed that his real estate at Tibberton aforesaid, devised to his said trustees, should be either mortgaged or sold, as his trustees should think best for his family, for the purpose of discharging his debts; and subject thereto, he devised the estate, in case he should die without leaving isssue male, to his daughter Caroline Anne Donovan for her life, with remainder to her first and other sons in tail male.

The testator died in July 1816.

Thomas Rodie proved the will, and died in 1818. The daughter had not then attained the age of twenty-one years; and letters of administration *de bonis non*, with the will annexed, during her minority, were granted to her husband, the defendant Scott. In 1819, she attained her full age; and procured letters of administration of the unadministered effects of her father, with his will annexed.

In January 1822, Mrs Scott published in the Gloucester newspaper an advertisement in the following words:—"Notice is hereby given by me, Caroline Anne Scott, of Tibberton Court, in the county of Gloucester, administratrix, with the will annexed, of my late father, Richard Donovan, of Tibberton Court aforesaid, and of the city of Gloucester, Esq., barrister at law, to all persons having or claiming to have any demand upon the estate of the said Richard Donovan, by specialty or otherwise, that they send in their several and respective statements of their demands, and also attested copies of their several and respective securities, to Messrs Clark, Richards and Metcalf, solicitors, 109 Chancery Lane, London, or to Mr Bubb, solicitor in Cheltenham, in the county of Gloucester, on or before the 24th day of April next, for their examination prior to the same being laid before John Hawksey Acherley, of the city of Bath, Esq., barrister at law, by whom I expect that the persons claiming to be creditors of the said Richard Donovan do submit to be examined touching and concerning the same, if the said John Hawksey Acherley shall see occasion, in order to their respective claims being approved and paid, or rejected, if such latter course be deemed expedient. Timely notice as to time and place will be given in the London Gazette, and in the Gloucester and Liverpool papers.

[Jones *v.* Scott.]

The general personal assets of the testator having been found to be not nearly sufficient for the payment of his debts, steps were taken to sell the Tibberton Court estate; and it was then discovered that the testator's interest in the property, instead of being freehold, as he had imagined, was only leasehold for a long term of years. In October 1822, the estate was sold under the trusts of the will for 10,500*l.*

The plaintiffs were creditors of Richard Donovan on the balance of a banking account, which had been ascertained in 1815. In compliance with the advertisement, which had appeared in January 1822, they, in April following, sent in a statement of their demand to Mr Bubb; and, no notice being taken of it, they, in July 1823, commenced an action in the common pleas against the administratrix and her husband. That action was met, on the part of the defendants, by a plea of the statute of limitations, and was shortly afterwards discontinued. The plaintiffs then, in 1824, filed the present bill, on behalf of themselves and the other creditors of Richard Donovan, praying, among other things, that the trusts of his will for the payment of his debts might be carried into execution under the decree of the court. The defendants, by their answer, insisted on the statute of limitations as a bar to the relief.

At the hearing two questions were raised. First, whether the devise of the Tibberton leasehold estate in trust to pay the testator's debts would prevent the statute of limitations from running against these debts? Secondly, whether the advertisement, published by the administratrix in January 1822, took the case out of the statute of limitations?

Mr Pemberton and Mr Farrer, for the plaintiffs.

This debt at the testator's death was a valid subsisting demand, not barred by the statute; and a trust or charge, created by will for the payment of debts, prevents the statute from running against such debts as were not barred in the testator's lifetime. Burke *v.* Jones, 2 V. & B. 275; Hughes *v.* Wynne, 1 Turn. & Russ. 307; Hargreaves *v.* Michell, 6 Mad. 326.

This is a consequence which follows from the nature of a trust, and is not dependent on the nature of the property which is the subject of the trust. Whether the property be realty or personalty, the result must, as to this point, be the same.

In Andrews *v.* Brown, Prec. in Chan. 386, it was held that, "if the debtor had made his will, and directed that all his debts should be paid, or made any provision for the payment of his debts in general, this would revive such a debt, and bring it out of the statute, so that his executors would be liable to the payment of that debt amongst the rest.

The advertisement calls on all persons, having claims on the testator, to bring in statements of their demands by a certain day, in order to their being approved and paid, or rejected. In Andrews *v.* Brown it was held "that if a man has a debt due to him by note, or a book debt, and has made no demand of it for six years, so that he is barred by the statute of limitations, yet if the debtor, after the six years, puts out an advertisement in the Gazette, or any other newspaper, that all persons who have any debts owing to them from him will apply to such a place, that they shall be paid; this (though it were general, and therefore might be intended of legal subsisting debts only), yet amounts to such an acknowledgement of that debt which was barred, as will revive the right, and bring it out of the statute again." Thus, it is clear that, if the advertisement had invited

the creditors to present their claims in order to their being approved and paid, the administratrix could not have insisted on the statute. But what difference can be made by the addition of the words "or rejected?" The demands are not to be approved, till they are examined; they may be approved or not approved, according to the case the claimant makes: the words "or rejected" only express one of the possible results of examination, the other possible result being approbation.

Mr Bickersteth and Mr G. Richards, contrà.

The advertisement does not contain any promise or acknowledgement: it reserves to the administratrix or her agent the full power of resisting and rejecting any demand, and of protecting the assets of the testator by "any course which may be deemed expedient."

In all the cases which have been cited, real estate was charged; a new fund was provided for the payment of debts. If the Tibberton Court estate had been, as the testator thought it was, freehold, these authorities would have been applicable to the present question. But it was merely leasehold; and the testator's mistake could not alter its nature or qualities. That leasehold would necessarily vest in his personal representatives, to be applied by them towards the payment of his debts: till the debts were satisfied, the trustees could have no concern with it; it was against the executor or administrator, and not against the trustees, that every creditor would necessarily claim. In fact, a testator cannot, as against his executors, give trustees his personal estate in trust for the payment of his debts; the executors are entitled to have that personal estate for the purpose of paying debts: he cannot interfere with the legal liability of the assets in their hands; and such a trust is in truth a nullity.

Mr Pemberton, in reply.

Though a testator cannot exempt his personal estate from his debts, why should he not have the power of extending or prolonging their liability? We are not questioning the rights of the executor, or lessening the rights of the creditors against the executor and the assets. We leave these rights untouched; but we say that the creditors have also equitable rights against the trust fund which the testator has created. So long as a single debt of the testator, which was not barred at his death, remains unpaid, not one shilling of the proceeds of the Tibberton leasehold can be applied to any other purpose than the satisfaction of his creditors, without a plain violation of the trusts declared in the will.

The Master of the Rolls. The law does not permit a testator to create a special trust of his personal estate, so as to withdraw it from the administration of his executors: whatever he may attempt to do in that respect, all claims must nevertheless be made against the executors; and trustees named in a will can receive only the residue, after all demands on the personal estate are satisfied. The debt of the plaintiff being, therefore, to be claimed against the executors, and not under the trust, is barred by the statute of limitations.

It is not revived by the notice published in the newspapers; inasmuch as Mr Acherley might have rejected any debt, upon the ground that the statute of limitations had run against it. Dismiss the bill with costs.

June 17, 1831.—The plaintiffs appealed from his honor's decree.

Sir Edward Sugden and Mr Farrer, for the appellants.

This will shows an anxious desire to provide for the payment of debts. Although the Tibberton estate was in fact leasehold for a long term, the testator has treated it as a fee-simple, probably from a mistake as to its nature, or perhaps from the common practice of claiming adversely to the reversioner, in the hope of ultimately establishing in the family a title to it as a freehold. The creation of a trust, or even of a charge upon freehold estate for the payment of debts, prevents the statute from running against any debts not barred at the time when the instrument speaks, that is, at the death of the testator. That point has been set at rest by lord Eldon's decision in Hughes *v.* Wynne, 1 T. & R. 307. Hargreaves *v.* Michell, 6 Madd. 326, and Rendell *v.* Carpenter, 2 Y. & J. 484, fully recognize the same doctrine; and till the present case, no distinction in this respect has ever been suggested between freehold and leasehold property. Neither authority nor principle warrants any such distinction. Burke *v.* Jones, 2 V. & B. 275, only decides that a trust for sale and payment of debts does not revive a demand that has been once barred; but it does not touch the principle on which the operation of an express trust or charge, in keeping alive debts valid at the testator's death, is founded, namely, that an intention is held to be thereby sufficiently indicated to provide for all obligations then subsisting. Looking to it as an index of intention, whether the subject of the trust or charge be really a freehold, or, though treated as such, prove an inquiry to be only leasehold, cannot make the least difference. The result of establishing a trust is, to convert the creditor into a *cestui que trust;* and as it then becomes the duty of the trustee to satisfy the debt out of the trust fund, his mere neglect to fulfil his duty, or the delay of the creditor to enforce his claim, can never prejudice the right; nor is it competent for those who represent the debtor in the administration of his assets, to insist upon an advantage which he has himself by implication directed to be waived. What can it signify whether the property, devoted by will to the pious purpose of saving the testator from sinning in his grave, is or is not by law applicable to that purpose? If a testator has an acre of freehold and a million in the funds, and chooses to create a trust for debts upon both species of property, as he has thereby in effect declared that the statute shall cease to run, it is immaterial whether the real estate be sufficient or not: for his intention (and that is to be the guide) plainly applies equally to the money as to the land; and the personalty therefore must equally bear the burthen. An opposite rule would involve this singular anomaly, that, while, under a general charge or trust for payment of debts, over all the property both real and personal, debts not barred would fall upon both proportionally, or in the first instance upon the personalty only, the debts, against which the statute had run after the debtor's decease, would remain effectual against his real estate, and his personalty would be altogether discharged from them; a consequence the very reverse probably of what the testator contemplated.

There is nothing in the doctrine of a court of equity inconsistent with the claim of these plaintiffs. So long as a testator leaves a sufficient provision for his debts, he may do so in any mode, however capricious, that he pleases. He cannot absolutely exempt his personal estate from being so applied, but he may, by substituting other adequate means, attain the same object indirectly. Subject to the qualification, therefore, of not breaking in upon the rights of creditors, he may bequeath his leaseholds, or any other part of his personal estate exonerated from his debts; and

the court will exercise its authority to uphold such a disposition. Thus, in Clarke *v.* Ormonde, Jac. 108, where a question arose as to the sale of heir-looms, an injunction was granted to restrain executors from disposing of them, there being otherwise ample funds to answer the testator's liabilities : and in Spode *v.* Smith, 3 Russ. 511, an arrangement was made with a view to preserve specific articles of personalty from being applied in payment of debts, upon the faith that there was other property sufficient to satisfy the creditors. In like manner the court, in its ordinary decrees, at first merely directs an account of the testator's personal estate *not specifically bequeathed ;* and, even in the absence of creditors, it will interfere to prohibit a sale, where the personalty is given in a different mode from that which the law would have directed. A testator may out of his leaseholds provide for a debt no longer recoverable at law, as he may also by express words prevent the statute from running after his death. So he may declare generally that his personal estate shall be subject to all his debts, to those which time has barred, or those which time might otherwise bar, as well as others ; and equity will enforce his declared intention.

The testator has here decided the point against his trustees. On his will he has represented himself to be the owner of an estate over which, he conceived, he had full power to create a trust or charge for payment of debts, a charge which would have embraced all debts not barred at his decease. Can a judge, then, be at liberty to refuse effect to that provision, because the estate turns out not to possess the particular character which the testator supposed ? The debtor has himself affixed that character to it ; and it is not because the property is freehold that he acquires the right to charge it, but because the circumstance that it is freehold, or treated as such, is a proof that he meant to go farther than the law would have done, in making it available for the discharge of his obligations.

Supposing the will itself not to be sufficient for that purpose, still the notice published by the executors before the six years had elapsed would take the case out of the statute. Andrews *v.* Brown, Prec. in Chan. 385, an authority which, though overruled in other respects by Burke *v.* Jones, stands unimpeached as to this point.

The Solicitor-General (sir W. Horne) and Mr Richards, in support of the decree.

The court has been gradually restricting the doctrine of the older cases, that a declaration in a will for the payment of debts puts an end to the operation of the statute. Burke *v.* Jones(*a*) has finally decided the point: and the decree under appeal only follows out the same principle. A charge of debts upon personal estate will not operate in the same way as a charge upon real estate, although perhaps the intention may be the same as to both : and the rule is different as to the two descriptions of property ; because, unless such an obligation be expressly imposed, the real estate remains unaffected, whereas upon the personalty the law always throws the liability, whether it be declared or not. A devise of leaseholds creates no new fund not otherwise available to the executors, and consequently

(*a*) 2 V. & B. 275, where the subject is elaborately discussed : some other cases are referred to in the notes to 3 P. W. 90, 6th edition. See also Executors of Fergus *v.* Gore, 1 Sch. & L. 107 ; Stackhouse *v.* Barnston, 10 Ves. 453 ; Ex parte Roffey, 19 Ves. 468 ; Stanton *v.* Knight, 1 Sim. 482.

can have no effect in letting in a claim that would be excluded by the statute; nor can a testator be permitted, according to his caprice, to vary or modify the rights of his creditors.

This is, in fact, a technical subject, and resolves itself into a mere question of assets at law. If the creditor proceeded for his debt by action, and the six years had run, the executor, by pleading the statute, could defeat the demand; and if, on the other hand, the remedy were not barred by lapse of time, it would be no defence to the executor, that the assets were in the hands of the trustees, nor would equity on that ground interpose to protect him; for the trustees would of course be his agents, and responsible to him. So long as any personal estate remained unapplied, he could not plead *plenè administravit*. If, therefore, a judgment were recovered, the plaintiff might immediately levy execution upon the term as assets. Suppose the will had specified a particular order to be followed in the payment,—that the book debts should be paid first, then the promissory notes, and so on,—that could not protect the executor at law, who is alone accountable for the property, and is bound to satisfy the debts, without reference to the directions of the testator. Whether the rights of the creditor are to be enforced in a court of law or of equity, as far as they apply to the same subject matter, they must, in either case, be co-extensive. On a bill for payment of the debts, the executors would be the only necessary parties, and it would be improper to join the trustees, who hold the property for the executors, and must account to them in the first instance. Here, the debtor has done nothing more than the law would have done for him. Suppose a testator says, "After payment of my debts, I give all my property equally among my children," can it be pretended for a moment that such an expression would preclude the executors from taking advantage of the statute to resist a claim against which time had run?

Upon examining the will attentively, no indication of intention as to the Tibberton estate can be collected from it. It does not appear that the testator intended to involve that estate to any greater extent than the law would do, if it were considered as personal; his object no doubt being, to make it liable in the same manner as his personal estate, but not to let in any demands against which time should have run. The authorities referred to on the other side are all cases of a charge comprising real property, which, not being in its nature liable to simple contract debts, stands upon a totally distinct footing. There the court has held, that, a trust being established which equity will enforce, the principles applicable to the relation of trustee and *cestui que trust* must regulate the rights of the creditors. But that doctrine has never been applied to personal estate, and it would be highly dangerous to do so; since every case of a mere charge,—for instance, a bequest "subject to debts," which is the common form to be found in every will,—would then effectually destroy the beneficial operation of the statute. The language of sir Thomas Plumer in Burke *v.* Jones, and of the present Master of the Rolls in Hargreaves *v.* Michell, implies, that the doctrine is not to be extended to personal estate.

If the debt be gone otherwise, the notice relied on could not have the effect of reviving it; for it was given only for the purpose of informing the creditors generally, and could not amount to an acknowledgement of particular claims. Brown *v.* Andrews is of very doubtful authority; but it has no application, as the circumstances there were altogether different.

[Jones *v.* Scott.]

Mr Booth, for the representative of the surviving trustee.
Sir E. Sugden, in reply.

June 30.—The Lord Chancellor (lord Brougham). The facts of this case, which is one of great importance both in respect of the principle it involves, and the consequences to which, in whatever way decided, it will lead, are shortly these.

A professional gentleman of the name of Donovan, who was indebted to certain persons in a sum of 260*l.*, made his will in 1815; and in 1816 he died. By that will he charged his debts,—not this particular debt by name, but all his debts,—upon his real estate, deeming it to be freehold, but which afterwards in point of fact turned out to be leasehold.

The intention, therefore, if any thing is to depend upon intention, is clear and manifest; it is plain he meant to have charged his debts even upon those estates which by law were not answerable for them. The debt in question was not barred by the statute at the period to which, according to all principle and authority, you are to refer, viz. the decease of the testator; but it was so barred before any suit was commenced, the suit for its recovery being brought after six years had elapsed from the death of the debtor; and the question was, whether the words "after payment of all my debts," charging them upon the real estate,—whether those words changed the nature of the property and of the claim (for that is one view), converting what was before a debt into a trust, and the creditor into a *cestui que trust*, and making the executor a trustee for the satisfaction of the demand; or whether, in another view, it was such a declaration of intention as amounted to an expression of the testator's will, that all his debts should be paid without regard to the statute of limitations. On either of those views, it was said, the words would be sufficient to take the debt out of the statute: for as it had not been barred at the time of the testator's decease, the nature of the debt, it was contended, and the situation of the creditor, were so altered by that devise, that the statute of limitations would no longer run against it.

The importance of this question will be obvious, when it is observed that most men's wills contain a clause which affects their personal property just in the same way as is done here, and they therefore give exactly the same protection to their creditors which this will does; with this difference, indeed, that here the intention is much more strongly marked, by reason of the mistake, the testator having clearly meant to keep alive his debts as against his freehold estate, and it being beyond dispute that the devise would have kept them alive had a real estate existed. The consequence of such a doctrine would be, that this very ordinary expression in a will, which, where you seek only to affect the personal estate, is superfluous, would prevent the executor not from pleading the statute at law, for of that defence he may still avail himself, but from taking advantage of it against a suit seeking to charge him with assets in equity.

I have looked with care into all the cases in search of light upon the subject, and I have also applied for assistance to a very great and venerable living authority. I should first, however, state that there is another circumstance to which the learned judge in the court below adverted, namely, that, after Mr Donovan's death, his daughter, who had taken out administration to him, published an advertisement in a newspaper, requiring the creditors to come in and prove their debts. And I find in Andrews *v.*

Brown authority, such as it is, that would lead me to consider that circumstance as decisive. The book, however, is of no great repute; and the judge who decided the case, lord keeper Harcourt, though a respectable lawyer, is certainly not to be ranked with the Parkers, the Finches, and the Hardwickes. The case itself, besides, contains other matters, which have since been distinctly overruled, although upon the point in which it approaches the case at bar, there is no express decision contradicting it.

[Here his lordship read the report in Precedents in Chancery, 385, and observed, that on two points, at least, the doctrine there laid down could not now be supported; for it was there said, that a direction in a will for payment of debts was sufficient to revive debts that had been previously barred; and that, in addition to an acknowledgement of the debt being still due, a promise to pay it was necessary, in order to frustrate a plea of the statute. His lordship then continued]—I therefore hold the authority of Andrews *v.* Brown to be of very little weight. Nevertheless it is fitting to mark this circumstance of the advertisement, especially as it shows the belief of the personal representative that the testator's intention was to have all his debts paid. That is not immaterial. It is one of the lights in which a bequest for payment of debts, or a charge of debts upon real estate, may be regarded; one of the two grounds on which the plaintiff's argument rests, being that this indicates a desire on the part of the debtor that his debts shall be paid, notwithstanding that by the lapse of time the remedy is gone. Assuming that to be the ground, the rule is now indisputably established in this court, however it may formerly have been doubted, that where there is a devise of lands for payment of debts, it will take those debts out of the statute; and, indeed, it was stated by lord Mansfield in Trueman *v.* Fenton, Cowp. 548, that it would be so held at law, if the case were properly brought before the court, on the principle of giving effect to the intention. If intention be the ground, can it make any difference whether that intention be signified by charging the debts upon freehold estate or upon leasehold? If intention be the criterion, then you must take the mind of the intender as it was circumstanced at the moment he did the act from which you seek to gather his intention. Mr Donovan believed his estate to be freehold, and in that belief he charged his debts upon it; and can his mistake with respect to the tenure make any difference? It was said, indeed, that if he had been aware the estate was leasehold, he would not have expressed the same intention, especially as he was a professional man, because he must have known that the law itself would charge the debts upon it as personal estate. This may or may not be so; but it only brings us round to the other view of the subject. It is clear that intention to charge, that is, to keep alive his debts, is evidenced as distinctly as can be; and, in my view, it signifies not whether that intention was formed under mistake as to the nature of the property, or under a correct conception of its nature.

There is another consideration, not much referred to in the argument. Are we not bound, in construing a will, rather to presume in favour of that view which makes each clause operative, than of that which leaves any clause wholly inoperative and nugatory? If the clause charging debts on the personal estate be not taken as meant to exempt them from the operation of the statute, what meaning can you possibly ascribe to it? The words are natural and sensible, if they be supposed to mean "I de-

sire that the statute shall not run against my debts; that no advantage may be taken of the unconscientious plea which only bars the remedy, but does not put an end to the obligation." Unless you suppose this to be the object of the clause, it fails of all effect; it is only saying, "let my debts be paid, as the law will take care to do whether I desire it or not—nay, in spite of my desiring the contrary." I cannot, without violence to probability, suppose that all men, professional as well as laymen, have continued for so long a time to put this clause into their wills, when they have no real property to dispose of, without any sense or purpose. That would be to reject the words as devoid of meaning; whereas the rule is, rather to adopt that construction which will give force and effect to every part of the instrument.

Coming, however, to that upon which chiefly the argument must be put,—that by a trust for payment of the debts you convert the creditor into a *cestui que trust*, and that, as between him and the trustee, time shall not run to create a bar,—it was said, and his honour seems to have been pressed by the argument, that a trust, made by a will of personal estate for payment of the testator's debts, is to be deemed an act wholly void and contrary to law. Now, I hold it to be one thing for an act to be merely nugatory; another, and a very different thing, for such act to be wholly illegal and void. A man may take in one way what, but for a particular provision, the law would have given him in another. I cannot say that such a provision is absolutely illegal, though it may be altogether unnecessary. When a person merely orders that to be done, which, if he had not so ordered, the law would have done for him, he does not come under the description of giving a direction which is void as being contrary to law. Some directions may be imagined, which would be superfluous in respect of the nature of the debt; others, in respect of the fund on which the debt is charged. Of the former kind would be a proviso that specialty debts should be paid out of the freehold estate; of the latter, the clause before us is an example. Other directions, again, are superfluous, not in respect of the fund or the species of the debt, but the quality of the debtor—the situation and circumstances of the person making the will. Thus, a trader within the bankrupt laws, and the 47 Geo. 3. would do what is superfluous, if he charged his simple contract debts upon his freehold estate; though with respect to a person not within those laws and that statute, it would be otherwise. In the case put, the act of the trader is superfluous; but it is not illegal, nor is it necessarily void. There is this difference, it is true,—that the remedy is somewhat different under the trust or charge created by such clauses, from that which would be given, if the matter were left merely to the operation of the law. But still what is done is superfluous; and yet it is clear that, if a bond debt were charged upon his freehold estate by the will of the obligor, although, in the ordinary case, satisfaction would be presumed after twenty years, all courts, whether of law or equity, would hold that, even after thirty or forty years had elapsed, the charge took it out of the operation of the rule, which has become by analogy a sort of judicial period of limitation. And so, I apprehend, if a trader charge upon his freehold estate debts against which the statute has run, though not at the date of his will, yet at the time of his decease, his debts will, notwithstanding both the statute and the superfluousness of the direction, be payable primarily out of his personal, and then out of his real estate, just as if the six years had not expired, or the direction had been operative in other respects. That the superfluousness

of a direction does not prevent it from keeping a debt out of the statute, which but for such direction would be barred, is clear from various cases. The intention to keep alive the debt is recognized by lord Eldon, in Ex parte Dewdney, 15 Ves. 497, as the main foundation of the principle. If it be contended, that the testator only means to charge his personal estate with his just debts—in other words, such as shall be found legally due at the time of the demand, and therefore not such as would be legally barred—it may be answered, that precisely the same argument applies to a charge of debts upon real estate, which it is admitted will take them out of the statute. The court has gone upon the supposition either of a trust or of intention, taking that as equivalent to a declaration of the testator's will and mind that the statute shall not run. A great deal of doubt seems at one time to have existed as to the particular force and extent of the rule; until the case of Burke *v.* Jones it should seem, from the current of authorities, and particularly from a case in the time of lord Hardwicke(*a*), that, though a debt was barred at the death of the testator, it would be revived,—not continued, but revived,—(a word implying that the debt was previously gone), by a devise for payment of debts. The case of Burke *v.* Jones, however, which was decided by sir Thomas Plumer after the fullest deliberation, and after consulting with the other judges of the court, drew this broad distinction,—that, if the debt were actually barred at the period of the death of the testator, the charge of debts upon the real estate had not the effect of reviving it.

The only question is, whether there exists any difference between a charge upon the real and a charge upon the personal estate. I have given my reasons for thinking that no such distinction can be maintained. My opinion is confirmed by what I find in the reporter's note to the case of Jones *v.* Lord Stafford, 3 P. W. 79(*b*); from which it appears that the point now before the court was, at the date of his book (1749), altogether unsettled; and all the inquiry I have been able to make, leads me to suppose that the point has never yet received a judicial decision.

Now, let us consider what will be the effect of this construction in the case of wills containing such a clause. The consequence will be, that a man's debts, if he chooses so to charge them upon his personal estate, provided that they be not barred at his decease, will be payable notwithstanding any length of time that may afterwards elapse. I know not that courts of equity, any more than courts of law, ought to lean against allowing a man to make such declarations of his intention to have his debts paid; and I have already stated, that, if this be not the meaning of the clause, I cannot see to what it applies, or upon what subject-matter it can operate. If it be construed as a direction by the testator to pay the debts without regard to the running of the statute after his decease, the words are quite rational and intelligible, and at the same time expressive of an honest and conscientious intention; for a man ought to wish to discharge his debts notwithstanding the lapse of time, if he knows they are unpaid, and not avail himself of the argument which lapse of time may furnish *in dubio* in favour of their having been paid.

Upon these grounds I have found myself bound to come to a decision contrary to that of his honour. My opinion is, as I have already stated, fortified by the authority to which I alluded; nevertheless, the point seems

(*a*) Lacon *v.* Briggs, 3 Atk. 105.

(*b*) The note referred to is by Mr Peere Williams, p. 89, (A).

to be by no means free from doubt. Not that I feel any difficulty as to the effect of such a decision in future; because then every man will know, when he frames his will, that the clause is introduced with a view to prevent the operation of the statute. But it was with respect to wills already made on account of the retrospective and intermediate effect of such a construction, before it can become generally known, that I felt so much anxiety and doubt as induced me to seek the lights of living as well as of departed learning. And although the opinion which I had formed is thus confirmed, yet, looking to the importance of the question, and the doubt in which it may to some still appear to be involved, it would be a satisfaction to have the whole subject reconsidered elsewhere. If the estate can conveniently bear the expense, I shall insure the earliest consideration of the case, and the best assistance which equity or law can afford, to the final settlement of what appears to me a principle of great moment in the law, as administered by this court.

Bowsher *v.* Watkins.

Russell and Mylne, 277.

Residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, though collusion between the executor and the surviving partner is neither charged nor proved.

Rolls.—Feb. 9, 10, 16, 1830.

JOHN BOWSHER and Watkins carried on business in partnership; and, at a yearly account settled on the 30th of April 1822, Bowsher's share of the joint stock in trade of the partnership was ascertained to amount to 42,948*l.* 3*s.* 3*d.* On the 21st of June following he died, having by his will disposed of the residue of his estate in favour of the plaintiffs, and appointed Thomas Ormerode and Mary Bowsher his executor and executrix. They proved the will. Sometime afterwards they entered into an arrangement with Watkins for converting the property of the partnership into money, and bringing the business to a close; and they appointed one Kirby to act on their behalf with Watkins in winding up the concern. In 1823, Kirby and Watkins entered into partnership.

The bill was filed by the residuary legatees of John Bowsher, against Watkins, Kirby, and the executor and executrix. It alleged that Watkins, after the death of the testator, employed stock and effects, belonging to the late partnership, in a business which had been carried on for his own profit; that he and Kirby, after they entered into partnership, carried on the business with property of the late partnership of Bowsher and Watkins, which remained unsold; that the plaintiffs had applied to Thomas Ormerode and Mary Bowsher to appoint some other person in Kirby's stead to get in the assets, or to take proper steps to compel Watkins and Kirby to account; that they had not complied with these requests, but had wholly neglected to take any steps to compel Watkins and Kirby to account; and "that by such neglect they countenanced and assisted Watkins and Kirby in misapplying the assets." The prayer was, among other things, that an account might be taken of the partnership dealings

from the last yearly settlement and of the moneys received on behalf of the partnership by Watkins, or by Watkins and Kirby.

Mary Bowsher and Kirby having died, the suit was revived against their personal representatives.

Watkins, by his answer, admitted, that, after the testator's death, he employed some effects belonging to the partnership, in building certain ships; but those ships were afterwards sold, and the proceeds were paid to a banker, to the joint account of him and the executors, and were duly applied as partnership assets. He denied that he and Kirby had made use of any part of the property of the late partnership in carrying on their business; and he did not believe that the plaintiffs had made to the executor and executrix the applications stated in the bill, or that the executor and executrix had refused to comply therewith.

Omerode stated, that Kirby had been selected to assist in winding up the concern, because he had been long the clerk of Bowsher and Watkins, and had enjoyed the unlimited confidence of the testator. He did not recollect or believe that any application had been made to him or the executrix to appoint some other person in Kirby's stead, or to compel Kirby and Watkins to account: he was not aware, till after the filing of the bill, that Kirby and Watkins had applied any part of the stock of the late partnership in their trade, except a few articles which had been valued to them; and though he had no notion, when Kirby was appointed, that that gentleman was afterwards to enter into partnership with Watkins, he considered his agency to have been highly advantageous to the estate of the testator. He denied that he had, by any negligence or otherwise, countenanced and assisted Watkins and Kirby, or either of them, in wasting the assets; and he did not believe that the assets had been wasted or misapplied.

There was no proof that the executor and executrix had acted in collusion with Watkins and Kirby, or that any applications had been made to them to compel Watkins and Kirby to account. The executor and executrix had not been called upon to file a bill against Watkins and Kirby, or either of them.

Mr Pepys, Mr Bickersteth and Mr Wright, for the plaintiffs.

Mr Tinney and Mr Piggott, for the personal relatives of the testator.

Mr Pemberton and Mr A. Crompton, for Watkins.

On behalf of Watkins an objection was taken to the frame of the suit. Watkins, it was said, was merely a debtor to the estate of the testator; and the rule is, that a debtor cannot be made a defendant to a bill filed by a residuary legatee; Utterson *v.* Mair, 2 Ves. Jun. 95; Beckley *v.* Dorrington, cited in 6 Ves. 749. The exception is, where there is collusion between the executor and the debtor; but collusion must be charged and proved. Here there is not so much as a charge of collusion. There is, indeed, an allegation that "the executors countenance and assist Watkins and Kirby in misapplying the assets;" but it is expressly stated, that the mode, in which this supposed countenance and assistance had been given, was by neglecting to compel them to account: the charge is therefore a charge of negligence only, which will not bring the case within the exception. Neither negligence nor collusion is proved. No application was ever made to the executor or executrix to file a bill against Watkins. Can an instance be produced, in which a legatee has been allowed to sue

a debtor to the estate, when he had never called upon the personal representative to institute proceedings?

If Watkins is to litigate any question between him and the estate of the testator, why is he to be called on to litigate it with any person except the executors? In a suit like the present, it is of great importance to the defendant, who the persons are with whom he is to contend as plaintiffs. Hitherto he has dealt with the executors; the greater part of the accounts sought by this bill have been arranged in the fairest manner to his satisfaction and theirs: had they instituted the suit, they would not have ventured to state such a case as is now brought forward; or if they had, an easy and complete answer to it would have been at hand. Is his situation to be altered for the worse, by allowing the residuary legatees to take upon themselves the functions of the executor?

On the other hand, it was said, in support of the bill, that there were special circumstances in the case which took it out of the general rule. Watkins was not a mere debtor to the estate: he was the surviving partner of a partnership in which the testator held the largest share; and, as such, he necessarily had part of the assets in his hands. The amount of the demand against him in respect of these assets could not be ascertained in an action at law; it must necessarily be investigated in a court of equity; so that he suffered no hardship from being made a defendant: and there would be extreme inconvenience in having one suit by the legatees against the executors, and another in the name of the executors against Watkins. In Newland *v.* Champion, 1 Ves. Sen. 106, it was held that the creditor had a right to make the surviving partner of his testator a defendant to a bill for an account. "I take the case of partnership," said lord Hardwicke, "to be different; and though there was no suggestion of collusion, yet I do not think the bill would have been demurrable to, as has been insisted on. Many bills are brought into this court, not only making the representatives parties, but also all other persons who have possessed the specific assets; and there are many instances where the surviving partner is made a party, that they may have an account of the personal estate entire." The same principle was followed in Doran *v.* Simpson, 4 Ves. 651, and Alsager *v.* Rowley, 6 Ves. 748. In Gedge *v.* Traill(*a*) a demurrer was overruled to a bill filed by a creditor against an executor and his partners, who had assets in their hands. Here Watkins, upon the death of the testator, came into the possession of

(*a*) Gedge *v.* Traill.

A bill, filed by a creditor of a testator against the executor, and certain persons who were in partnership with the executor, alleged that the partnership claimed to be entitled to retain assets which were in their hands, in satisfaction of a debt which they pretended was due to them from the testator; but it did not charge in express terms that the executor was colluding with his co-partners: the creditor was held to have, under such circumstances, a right to sue all the partners; and a demurrer by the partners, other than the executor, was overruled. Nov. 3, 1823.

A TESTATOR died in India, having appointed certain executors in that country, and other executors in England. The defendant, Traill, a partner in the house of Paxton & Co., was the only person who proved the will in England; and the executors in India had remitted to him assets to a considerable amount.

The original bill was filed against Traill by a creditor of the testator, for payment of a debt. Afterwards, all the partners in the house of Paxton & Co. were made defendants by amendment: and it was alleged that the assets had been remitted either to Traill or to Paxton & Co.; that

assets, and had been dealing with those assets. The possession of the assets rendered him accountable to a person beneficially interested in the estate.

The MASTER of the ROLLS was of opinion that the plaintiff had a right to sustain the bill against the surviving partner.

The decree directed an account of the partnership dealings and transactions of Bowsher and Watkins, from the 30th of April 1822; an account of the property and effects of the partnership at the time of the testator's death, and of the amount of his capital engaged therein; and an account of the sums received by Kirby, and retained by him on account of his services and expenses; with an inquiry whether any thing was due to or from his estate in respect thereof.

Reg. Lib. 1829, A. 2908.

Paxton & Co. claimed a large sum as due to them from the testator; and that the defendants pretended that Paxton & Co. were entitled to retain the assets in discharge of their own claim.

There was no express charge that Traill was colluding with his co-partners.

The partners in the house of Paxton & Co., other than Traill, put in a general demurrer to the bill for want of equity.

Mr Cockerell in support of the demurrer.

There is no privity between the demurring defendants and the plaintiff: they are accountable to the executor, and the executor is accountable to the plaintiff. The possession of assets constitutes Paxton & Co. a debtor to the estate of the testator; but a creditor has no right to call them to an account, or to enforce payment of that debt, unless the executor be insolvent or acting in collusion with them. Alsager *v.* Rowley, 6 Ves. 748. In the present case, neither collusion nor insolvency is charged.

Mr Teed, contra.

It is immaterial whether it be alleged in words, that Traill colludes with the other defendants, if facts are stated on the face of the bill, which show that he and they are acting in concert. Such concert follows necessarily from the fact of his being in partnership with them. It is the partnership which retains the assets; this retainer is the joint act of Traill and his co-partners; and any person, who has an interest in the estate, must be entitled to sue him and them jointly. Such a state of things constitutes an exception from the general rule, that a debtor to the estate cannot be made a defendant to a bill by a creditor.

The VICE-CHANCELLOR (sir John Leach) stated, that, in substance, it was collusion on the part of the executor, if a stranger retained assets with his consent and approbation; that this bill alleged that all the partners (of whom Traill was one) retained the sums remitted, and claimed to be entitled to retain them; and that those circumstances amounted to collusion, and brought the case within the exception from the general rule.

The demurrer was overruled.

Collins *v.* Archer.

Russell and Mylne, 284.

Purchase for valuable consideration without notice is not available as a defence against a plaintiff who relies upon a legal title.

A rector, in 1811, demised his rectory to A. for a term of years to secure the due payment of an annuity; in 1814, he, for valuable consideration, demised the tithes of certain lands within the rectory to the occupier B., who, at the time, had no notice of the prior charge: the annuity fell into arrear in 1816: and, in 1817, the rector took the benefit of the insolvent act: B. remained in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814; and no step was taken to enforce payment till 1827, when A. filed against him a bill for an account; in answer to which, B. insisted that he was a purchaser for valuable consideration without notice: Held,

That that defence was of no avail against the legal title of the plaintiff;

And that the defendant ought to account for the tithes for the six years before the filing of the bill.

Rolls.—February 11, 23, 1830.

HENRY GODDARD, being rector of the rectory and parish church of Castle Eaton, executed an indenture bearing date the 21st of January 1811, by which he granted to Collins, in consideration of 4000*l.*, an annuity of 550*l.* for the life of him, Goddard: and, for the more effectually securing the annuity, he thereby granted and demised the said rectory of Castle Eaton and the vicarage of Deverill Longbridge, therein mentioned, with the messuages and tenements, and all the tithes, issues and profits belonging thereto respectively, unto John Pern Tinney, his executors, administrators and assigns, for the term of ninety-nine years, if he (Goddard) should so long continue the incumbent of the rectory and vicarage, without impeachment of waste, upon certain trusts for securing the payment of the annuity. As a further security, judgment for 8000*l.* was entered up against Collins; on which, as often as the annuity should be in arrear for the space of forty days, Collins was to be at liberty to issue one or more writ or writs of *levari facias de bonis ecclesiasticis*, for the purpose of sequestering the rectory and vicarage.

The annuity being in arrear to the amount of 693*l.* 10*s.*, Collins, in May 1815, procured a writ of sequestration of the rectory for the sum of 8000*l.* and costs, indorsed to levy 693*l.* 10*s.*, besides costs and expenses; and upon this writ letters of sequestration were granted to Collins. In 1817, Goddard took the benefit of the insolvent act; and, under an order of the court for the relief of insolvent debtors, the bishop of the diocese, on the 1st of December 1817, granted to Collins letters of sequestration of the rectory, so far as it could or might be subject to such sequestration.

On the 6th of December 1817, the annuity being in arrear to the amount of 1000*l.* and upwards, a writ of sequestration was issued, indorsed for 7420*l.* 18*s.* 1*d.*, besides costs and expenses, upon which letters of sequestration, bearing date the 6th of December 1817, were granted to Collins.

The bill was filed on the 3d of April 1827, by Collins and John Pern Tinney, his trustee, against Archer, who, it was alleged, had for six years immediately preceding, occupied certain lands within the parish, and had

not, during that time, set out the tithes of the titheable matters which had grown or arisen upon them. The prayer was, that he might account for the value of the tithes which had been so subtracted.

Archer, by his answer, stated that, Goddard being or pretending to be seised of the rectory of the parish of Castle Eaton as rector thereof, and, as such, entitled to all tithes within the same, by indenture of covenant, dated the 2d of November 1814, in consideration of 1250*l.* then paid to him by Archer, and of the further sum of 1500*l.*, to be paid to him by Archer, his executors or administrators, on or before the 25th of December then next, he (Goddard) did covenant with Archer, his executors, administrators and assigns, that he would, on or before the 25th of December then next, make a good and effectual demise to Archer, his executors, administrators and assigns, for a term of ninety-nine years, determinable with Goddard's life or incumbency, of all the glebe lands of the rectory, and also of all the tithes of certain lands therein described, which were then in the tenure or occupation of Archer; and that Goddard did further covenant to execute, as an indemnity against the forfeiture, avoidance, resignation, or sequestration of the lands, tithes and hereditaments during his life, a bond in the penalty of 2750*l.*, and a warrant of attorney to enter up judgment for the same sum: that the 1500*l.* was duly paid to Goddard, who, accordingly, by indenture dated the 24th of December 1814, demised to Archer, among other things, the tithes of certain lands therein mentioned, including the lands, in respect of which tithes were claimed by the bill, for the term of ninety-nine years, if he (Goddard) should so long live, with the usual covenants against incumbrances, and for title and quiet enjoyment: that, by virtue of the said indenture, he (Archer) openly and publicly entered into possession of the titheable lands and tithes thereby demised, and had ever since from year to year collected or received and retained the tithes: that it was from 1814 well known throughout the parish, and to the plaintiffs, that he, the defendant, had acquired the rector's interest in the tithes of the lands in his own occupation; and that the plaintiff had not made any demand upon him in respect of tithes, till shortly before the filing of the bill.

The defendant further stated, that, at the time of the respective payments of the sums of 1250*l.* and 1500*l.*, he had no information, knowledge, belief, or notice of any prior incumbrance or claim by or on the part of Collins or any other person, to the rectory, tithes and premises so demised and granted, or any part of the same; and he submitted "that he was a *bonâ fide* purchaser for valuable consideration, and without notice of the grant of the annuity to Collins, or any prior or other incumbrance on the said rectory of Castle Eaton, than the demise to himself;" and he claimed "to have the full benefit of the several matters so stated by him, in like manner as if he had pleaded them in bar to the discovery and account sought by the bill."

Goddard died after the institution of the suit.

It was stated by one of the witnesses for the defendant, that Tinney, from Lady-day 1816, collected and received the tithes, or a compensation in lieu of them, from all the occupiers within the parish, except the defendant Archer, and that, in May 1816, he claimed the tithes of Archer's lands, "as the prior assignee or sequestrator under Goddard."

The bill did not allege that tithes had been claimed from Archer at any particular time.

Mr Tinney and Mr Rolfe, for the plaintiffs.

[Collins *v.* Archer.]

The 13 Eliz. c. 20, enacts, "that all chargings of such benefices with cure hereafter with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void." That act was repealed by the 43 Geo. 3. c. 84, s. 10, but was partially revived in 1817. The deed of 1811, under which the plaintiffs claim, having been executed while the 43 Geo. 3. c. 84, was in force, is a valid instrument, and passed the legal estate in the rectory to the trustee Tinney. Doe d. Cates *v.* Somerville, 6 Barn. & Cress. 126. From the time when that deed was executed, the legal title to demand and receive the tithes was in Tinney as a trustee for Collins; and the defendant, who, in the mean time, has not set out his tithes, or made payment in lieu of them to any person, must now account to the plaintiffs.

The defence set up by the answer is, that Archer, under a deed executed in December 1814, is a purchaser of the tithes in question for valuable consideration, without notice of the title of the plaintiffs. Purchase for valuable consideration, without notice, will protect the purchaser against an equitable title, but is not available against the legal title. In William *v.* Lambe, 3 Bro. C. C. 264, which was the case of a bill by a widow for dower, lord Thurlow said, "the only question was, whether a plea of purchase without notice would lie against a bill to set out dower: that he thought where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not a legal claim;" and he therefore overruled the plea. This passage is referred to by lord Manners in Medlicott *v.* O'Donnell, 1 Ball & Beatty, 156, and the soundness of the doctrine is not questioned. The effect of Wilkes *v.* Bodington, 2 Vernon, 599, is, that a defendant, in order to avail himself of the plea of being a purchaser without notice, must have either the legal estate, or a better right than the plaintiff to call for the outstanding estate; and, consequently, that that plea can never be made use of against a plaintiff who relies on a legal title.

If a party sought to enforce his legal title in a court of law, the defence of purchase for valuable consideration could not be set up. Why, then, should it be available in a court of equity, when that court is not acting on an equitable title, or giving equitable relief, but is proceeding on a title purely legal, and exercising a concurrent jurisdiction with courts of law, for the purpose of giving the same relief as would be afforded by them, but of giving it by more effectual or convenient means(*a*). Here the plaintiffs stand upon their legal title to the tithes; they might recover them by an action, against which the title of purchase for valuable con-

(*a*) Lord Redesdale says (Treatise on Pleading, 4th ed. p. 288), "If a defendant is a purchaser for a valuable consideration, without notice of the plaintiff's title, a court of equity will not, in general, compel him to make any discovery which may affect his own title. 2 Ves. Jun. 458; 3 Atk. 302. Thus, if a bill is filed for discovery of goods purchased of a bankrupt, the defendant may plead that he purchased them *bonâ fide* for a valuable consideration, paid before the commission of bankrupt was sued out, and before he had any notice of the bankruptcy." Perrat *v.* Ballard, 2 Cas. Chan. 72; Heyman *v.* Gomeldon, Finch R. 34; Abery *v.* Williams, 1 Vern. 27.

At page 274 of the same treatise, lord Redesdale expounds the doctrine on this subject, and makes no mention of any exception in favour of a plaintiff, who comes into equity upon a legal title. "Supposing," says he, "a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the

sideration without notice would be no defence: and they apply to a court of equity (the subject being one in which a court of equity has concurrent jurisdiction), because the account, which is necessary to complete relief, can be obtained more conveniently here than by proceeding at law.

Mr Pemberton and Mr Boileau, contrà.

A court of equity never interposes against a purchaser for valuable consideration, and without notice. If the person who claims against him has a legal title, that legal title may be enforced by legal remedies; but a court of equity will not act in aid of it. If a plaintiff files a bill for a discovery in aid of an action at law, the defendant may plead that he is a purchaser for valuable consideration without notice. The *dictum* in Williams *v.* Lambe is not in accordance with the general doctrine of the court; and it could scarcely have been necessary in that case to consider the point; for it is not easy to conceive how purchase for valuable consideration without notice could be pleaded in bar to a bill to set out dower. Every man who buys, is bound to ascertain whether the parties from whom he buys had wives entitled to dower.

The title of Collins, as sequestrator, is inconsistent with the title of Tinney as trustee of the term; and it is not here that they are to seek their remedy in respect of the judgment of which they claim the benefit, and the writs of sequestration which they have issued. The bill can be sustained only upon the demise; and the title of the plaintiffs cannot be carried higher than that of mortgagees of the rectory having a right to enter into the receipt and income of the tithes. Now, the annuity was in arrear in 1816; and though they were aware that the defendant claimed the tithes of his lands under the deed of 1814, they took no steps against him. The bill does not allege that they called upon him at any particular time to account to them. As they have permitted Archer to retain the tithes, he must be in the same situation as if he had paid them to another person claiming under the grant of 1814. The plaintiffs are to be considered as, at the most, only mortgagees who have not taken possession; and it is well known that such a mortgagee is not entitled to an account of bygone rents. The retainer of the tithes by Archer under the grant from Goddard, is equivalent to payment to Goddard: the plaintiffs could not have called upon Goddard to account for what he had received; how can they have a larger remedy against the defendant, who must be admitted to be entitled, under the deeds of 1814, to all Goddard's rights? They cannot have an account from any earlier period than the filing of the bill.

Mr Tinney, in reply.

The defendant is in the situation of an occupier who has not paid tithes to any body. The plaintiffs, under their demise, were entitled to the

protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side."

Sir E. Sugden, in his Treatise on the Law of Vendors, 6th edition, 741, 742, cites Burlase *v.* Cook, 2 Freem. 24; Rogers *v.* Seale, 2 Freem. 84; Parker *v.* Blythmore, 2 Eq. Ca. Abr. 79, pl. 1; Williams *v.* Lambe, 3 Bro. C. C. 264; and Jerrard *v.* Saunders, 2 Ves. Jun. 454; and concludes with the following observations: "To argue from principle, it seems clear that the plea (of purchase for valuable consideration without notice) is a protection against a legal as well as an equitable claim; and as the authorities in favour of that doctrine certainly preponderate, we may, perhaps, venture to assert that it will protect against both."

See also Mr Belt's note on Williams *v.* Lambe, and Gait *v.* Osbaldeston, 5 Mad. 428, and 1 Russell, 507.

tithes; and it was the duty of the defendant to have set them out: at law he would be answearble for the value of the tithes for the six preceding years; and as this court has concurrent jurisdiction in the matter, the relief granted here must be as extensive as the remedy would be at law.

If the defence of purchase for valuable consideration without notice could be set up against a legal title, recourse would be had to it in almost every suit where the right to tithes is in question. For instance, where a vicar files a bill against an impropriate rector who has long been in the receipt of the tithes which the vicar claims, the defendant might say that he was a purchaser for valuable consideration without notice, and so protect himself from giving discovery, and ward off the relief.

Feb. 23.—The Master of the Rolls. The defendant states, by his answer, that he is a purchaser for valuable consideration, without notice of the plaintiff's prior charge. Following the case of Williams *v.* Lambe, 3 Bro. C. C. 264, and the general principle of a court of equity, I am of opinion that that defence is of no avail against the legal title.

Another question is, from what time the account is to be taken against the defendant? In these cases a court of law and a court of equity have concurrent jurisdiction; and inasmuch as, in a court of law, the plaintiff could recover the arrears for six years before the commencement of the action, the defendant here must account for the tithes for the six years previous to the filing of the bill.

Hoggart *v.* Scott.

Russell and Mylne, 293.

The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing, he can show a good title, although he had not such title at the time of the contract: but the defendant might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, and was not bound to wait till the plaintiff could acquire a good title.

Rolls.—March 8, 9, 1830.

A TESTATOR, Bush, had devised freehold estates upon trust, to sell: the survivor of the trustees died intestate as to the trust estate, which became vested in an infant heir; and the plaintiffs, Abbot and Smith, who were the personal representatives of the survivor of the trustees, and had acted on the notion that the execution of the trusts of Bush's will had devolved upon them, entered into an agreement, in November 1825, to sell part of the property to the defendant. In February 1826, the misapprehension, under which they had acted, was discovered: and the purchaser was apprized that the vendors would take the necessary steps for getting in the legal estate which was outstanding in the infant heir. With that view, a petition was presented, in June 1826, under the 6 Geo. 4. c. 74; and, on the 23d of that month, the usual order of reference was made. Difficulties occurred in the prosecution of the reference: in September 1826, and subsequently, the solicitor of the purchaser repeatedly called

upon the plaintiffs either to complete the title or to return the deposit; and their solicitor communicated to him the proceedings which were going on. On the 26th of May 1827, the Master made his report, which was shortly afterwards confirmed; and, on the 30th of June 1827, a further abstract was delivered. A suit was then instituted to have new trustees appointed for the execution of the trust of Bush's will: in that suit the plaintiffs, Abbot and Smith, were appointed trustees; and, under an order of the court, directing the infant heir to convey, the estate, in December 1827, became vested in them.

In the mean time the purchaser, in May 1827, commenced an action for the recovery of his deposit, in which he obtained a verdict. In October 1827, the bill was filed for specific performance of the contract.

Mr Bickersteth and Mr Mac Arthur, for the plaintiff.

Mr Pemberton and Mr Phillimore, for the defendant, referred to Wynn *v.* Morgan, 7 Ves. 202.

The Master of the Rolls. The bill is filed for the specific performance of a contract for the sale of a freehold estate.

The plaintiffs were the executors of the surviving trustee, to whom the power of sale was given by the will of a testator: and considering that the power had devolved upon them, they entered into the contract with the defendant. The surviving trustee left an infant heir: and, the misapprehension of the plaintiffs being discovered, a petition was presented, upon which, with the privity of the defendant, the usual order was made, referring it to the Master to inquire whether the heir was an infant trustee within the meaning of the act. The Master having reported in the affirmative, a bill was filed for the appointment of new trustees, in the place of the infant heir; and in that suit the plaintiffs were appointed the new trustees: but before the decree was obtained in it, the present bill was filed.

An objection was taken at the hearing, that the plaintiffs, at the time of the contract, had no power of sale, and that the contract, therefore, could not be enforced.

The objection must be overruled. The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title; and he was not bound to wait until they had acquired a title; but, he not having taken that course, it is enough that at the hearing a good title can be made.

His honour decreed a specific performance.

Dalby *v.* Pullen.

Russell and Mylne, 296.

Under a decree for sale, made in a suit for the administration of a testator's assets, A. became, in 1813, the purchaser of certain lots, and, after a long resistance to the title, was in 1824 compelled to pay the purchase-money into court, and was let into possession: two years afterwards, and before the conveyances were executed, having discovered, by means of the information of third parties, a circumstance which constituted a material defect in the title, and which, there was reason to believe, had been long before known to the solicitor of the plaintiff, he obtained a reference back to the Master; the Master reported against the title; to the report exceptions were taken, and before the exceptions came on to be heard, the vendors had cured the defect:

Held, that the purchaser had a right to be discharged from his contract, and that a further reference of title ought not to be directed:

That, in a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit.

March 16, 18, 1830.

JOHN CARTER, by his will, dated in February 1778, devised and bequeathed the residue of his real and personal estates to his brother Nicholas Carter, and died in September 1781, when Nicholas entered into the receipt of the rents and profits of all the lands and tenements of which John was in possession at the time of his death. In March 1784, Nicholas Carter made his will, by which, after devising his freehold, copyhold and leasehold lands, tenements, and hereditaments to his wife for life, he directed, that, upon her death, they should be sold, and that the moneys to arise by such sale should be divided equally between and among his seven daughters. He died in the same year, leaving his seven daughters him surviving: his widow immediately entered into the receipt of the rents and profits of all the lands of which he had been in possession at his decease, and continued in such receipt during the remainder of her life. Her death happened in 1811. Shortly afterwards, a suit was instituted for the purpose of having the will established, and the trusts of it carried into execution; and, on the 13th of March 1813, a decree was made establishing the will, and directing the estates to be sold. They were accordingly sold in thirty-two lots, before the end of the year, for sums amounting to considerably more than 30,000*l.*

With a view to simplify the title, which had been embarrassed by various incumbrances made by the daughters and their husbands, deeds were executed in February and May 1816, by which the estates were vested in trustees, upon trust to convey to the several purchasers; and fines with proclamations were levied by six of the daughters: the seventh was prevented by her absence abroad from concurring in the fines.

Sir Robert Wigram had been reported the purchaser of lots 1, 2, 8 and 9, at the respective prices of 710*l.*, 1670*l.*, 1875*l.*, and 950*l.* On the abstract delivered to him it appeared, that part of the property which he had bought was derived from John Carter, and that it had been conveyed to him subsequently to the date of his will, so that it would not pass to Nicholas as his devisee. Sir Robert Wigram, therefore, required proof

that Nicholas was the heir of John. In November 1816, the solicitor of the plaintiffs stated, in reply, that he had searched for, but had not found, the registry of the marriage of George Carter, the father of the devisors, John and Nicholas; that it appeared by the entries of baptism of John and Nicholas, that the former was baptized on the 17th of July 1726, and the latter on the 30th of January 1731; and that on the death of John, Nicholas had been admitted, as his heir, to some copyholds which John had not surrendered to the use of his will. This statement was considered satisfactory; objections, however, were made to the title on other grounds; these were answered; and finally the Master reported that a good title was made to all the lots, except lot 2.

Sir Robert Wigram took exceptions to the report; the exceptions were overruled; and, on the 4th of December 1824, an order was made discharging him from the purchase of lot 2, and ordering the purchase-money of the three other lots to be paid into court. The money was paid accordingly, and sir Robert Wigram was let into possession.

In November 1826, before any conveyance to him was executed, sir Robert Wigram was informed by persons who were not parties to the suit, that Nicholas Carter was not the heir of John; for that Nicholas had an elder brother, George, who died in the lifetime of John, the testator, and left a son John, who, as heir at law, was entitled to the estates which John, the testator, had purchased after the date of his will. Sir Robert Wigram immediately communicated this information to his solicitor, who caused a search to be made in the registers of the parish church of St Giles within Cripplegate, and there found entries of the baptisms of three sons and three daughters of George Carter of the said parish, butcher, and Elizabeth his wife. The three sons were named John, George, and Nicholas; John was born on the 24th of June 1726, and baptized on the 17th of July 1726; George was born on the 21st of August 1727, and baptized on the 3d of September 1727; and Nicholas was born on the 5th of January 1731, and baptized on the 30th of January 1731. The register of the same parish contained an entry of a marriage solemnized on the 29th of December 1755, between George Carter, bachelor, and Sarah Carter, spinster, both described as resident in the said parish; and entries of the baptisms of two sons of George Carter of the said parish, butcher, and Sarah his wife, namely, George, born on the 27th of July 1757, and baptized on the 14th of August in the same year, and John, born on the 11th of May 1759, and baptized on the 30th of the same month of May. In the register of burials of the same parish was an entry of the burial of George Carter, a child, on the 20th of August 1758. John Carter, the surviving son, was the person who now claimed, as heir of his uncle John Carter the testator, the lands purchased after the date of his will.

In this state of circumstances, on the 15th of January 1827, an order was made, on the application of the purchaser, referring back the title to the Master: he reported against the title; and to his report exceptions were taken. While the exceptions were pending, an order was made in the cause, by which it was referred to the Master to inquire whether it would be for the benefit of all parties that a sum of 1000*l.* should be paid to John Carter, in consideration of his releasing and conveying his claim and interest. The Master reported in the affirmative; the money was paid to John Carter; and in March 1829 he executed a release and conveyance of all his interest.

Shortly afterwards the exceptions were argued and overruled, and as

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soon as they were disposed of, two motions were made;—one on behalf of the purchaser, to be discharged from his purchase; the other on behalf of the plaintiffs, that it might be referred back to the Master to review his report, and inquire whether the vendors could now show a good title.

The affidavits sworn in support of the purchaser's present application, and of his application in January 1827, when the last order of reference was made, disclosed the facts which are stated above. It appeared further by the affidavit of one Thomas Price, the brother-in-law of John Carter the claimant, that, about the 4th of December 1826, Thomas Dalby, one of the plaintiffs, in a conversation concerning John Carter's claim, informed him, Price, that, about ten years before, he had complained to his solicitor of the delay which had taken place in bringing the affairs of Nicholas Carter to a settlement, when his solicitor told him, that sir Robert Wigram's solicitor insisted on having an heir-at-law of John Carter, and that there was an heir-at-law, but that he could not be brought forward without danger to a considerable part of the freehold lands.

The solicitor of the plaintiff, on the other hand, denied that he, on the occasion referred to by Price, or at any other time, made to Dalby the statement there ascribed to him; but he believed that he mentioned to Dalby a rumour he had heard, that Nicholas Carter had an elder brother, George, and that Dalby said he always understood Nicholas to have been the heir of John, and requested the deponent not to speak of his having heard any thing which might impeach the title of Nicholas as heir of his brother John. He further swore, that at the time when he prepared the abstract, he firmly believed Nicholas Carter to have been the next brother and heir of John, and considered George to have been a younger brother of Nicholas; and that he never heard that there was any brother of John Carter older than Nicholas, or that George had left any issue, until several years after the sale of the estates, and until long after the deeds of 1816 were executed, and the fines levied.

May 15, 1829.—The Vice-Chancellor granted sir Robert Wigram's motion, and refused the other motion, with costs. 3 Simons, 29.

A motion was now made before the Lord Chancellor on behalf of some of the defendants, that the order of the Vice-Chancellor might be rescinded, and that it might be referred back to the Master to inquire whether a good title to the premises could now be made.

Mr Knight and Mr Wray, Mr Horne and Mr Whitmarsh, Mr Teed and Mr J. Russell, for different parties in the cause, in support of the application.

There is no question that the only defect which exists in the title has been cured since the date of the report, and that the parties are now in a condition to give the purchaser all that he contracted for. In Esdaile *v.* Stephenson, 6 Mad. 366, the rule applicable to such cases was laid down by sir John Leach, after consultation with lord Eldon, in the following words:—"If the Master should report against the title, and at the hearing, upon further directions, the vendor had cured the defect, the court would then compel the purchaser to take the title, although it would not suspend the contract with a view to a future proceeding to perfect the title; and if the fact whether the vendor could at the hearing cure the defect were in question, it must be then sent back to the Master to review

his report, with the additional circumstances." The hearing of the exceptions in the present case corresponds to the hearing on further directions in a suit for specific performance regularly prosecuted. The same doctrine was acted upon in Wynn *v.* Morgan, 7 Ves. 202, and Coffin *v.* Cooper, 14 Ves. 205. In the latter case the title was made good by an act of parliament, obtained after the Master had reported against the title(*a*).

In the present case a further reference will not be attended with either inconvenience or injury to any one; and, on the contrary, injustice will be done, if sir Robert Wigram is now discharged from his contract. He has been for five years in possession of the property; he has dealt with it as his own; and the parties cannot now be placed in the same situation as if no contract had been entered into.

Lechmere *v.* Brasier, 2 J. & W. 287, which was relied on in the court below, has no application to a question like the present. There the purchaser bought under a decree in which the direction for sale was clearly erroneous, the fact of the trading of the testator, which alone could give the plaintiffs a right to call for a sale, not being proved in the cause. To cure this defect, the decree had been re-heard, and another decree made, not reversing the former, but adding to it a new direction, which was also erroneous. What the court did there was merely to discharge the purchaser, when it was perfectly clear that the court had not then a right to direct the sale, and when it was altogether uncertain whether a valid decree for sale could ever be made.

The ground of the decision of the Vice-Chancellor was, that the solicitor of the plaintiff had not communicated to sir Robert Wigram the information which had reached him, that Nicholas Carter was not the heir of John. But if the conduct of the solicitor is viewed fairly, he does not appear to be liable to just blame. When application was made to him for proof of the heirship of Nicholas Carter, he communicated to the purchaser all that he had heard; he suppressed nothing; he stated nothing which he did not himself believe; and if the advisers of the purchaser were satisfied with imperfect evidence, the fault lay with them, and not with the vendors. It could not be said that the solicitor was negligent in not making a more careful search in the parish register: for it was as easy for the purchaser as for the vendors, to cause such a search to be made. The charge against the solicitor amounts, in truth, to this, and no more, that he did not communicate to the adverse party a vague rumour, which, some years afterwards, reached his ears, of Nicholas having had an elder brother, George. But it does not appear that he was aware that George left issue: and, after an undisputed possession of more than forty years, while all the members of the family were living in the same neighbourhood, nothing could be more natural than that he should believe, what never seems to have been questioned by any persons connected in blood or affinity with the parties, that Nicholas Carter was in fact heir to the lands and hereditaments, which he, and those claiming through him, had so long enjoyed by virtue of that supposed title. In truth, the period of time which was allowed to elapse after 1824, without hurrying on the completion of the conveyance to sir Robert Wigram, is a convincing proof that the parties adverse to him were acting *bonâ fide*.

But suppose that the solicitor of these plaintiffs is deservedly open to blame; why are the defendants to suffer for his acts or omissions, whose

(*a*) See Sugden's Law of Vendors and Purchasers, 6th edit. p. 361, 8th edit. p. 373.

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agent he never was, and among whom are married women and infants? They were not aware of any secret defect in the title: neither they nor their agents were accessary to the suppression or concealment of any fact. The present application is made on behalf of persons who were not represented by the culpable individual: Why are they to be bound by what he did or omitted to do? The practice of the court gives the conduct of sales under a decree to the plaintiffs and their solicitor: the power of management, which belongs to the solicitor for the plaintiffs, is not derived from the defendants: if he does aught amiss, the blame must be imputed either to his clients, the plaintiffs, or to the court, whose rules confer on him a certain extent of power, and not to parties who had not the means of either preventing or controlling his misconduct.

Sir Edward Sugden and Mr Wigram, contrà.

The solicitor who acts in the management of the sale, who prepares and delivers the abstract, and who answers, or affects to answer, the objections made to the title, must be considered as, for this purpose, the agent of all who have any interest in the sale, the agent of all the parties to the suit. Now, as between vendor and purchaser, the most perfect good faith is required; and if, before the completion of the contract, there is either *suppressio veri* or *suggestio falsi*, there is an end to the rights of a vendor in a court of equity. To a vendor who has been acting with perfect *bona fides*,—who has laid before the purchaser his title, such as it exists,—the court has in some cases allowed the indulgence of remedying, by what means he may, any defect which may be discovered in it, before the question comes on for final adjudication. Those cases, however, are not very numerous; and there is the highest authority for saying that the indulgence will not be extended. "I will not," says lord Eldon, "extend the rule which the court has adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied." Lechmere *v.* Brasier, 2 J. & W. 289. The question then simply is, has the rule ever been applied to such a case as the present? And it is for those who hold the affirmative to produce an instance in support of their position.

It is impossible to doubt, that, while the title was in litigation on other grounds, the solicitor of the vendors was perfectly aware, or had reason to believe, that Nicholas Carter was not the heir of John: and it unquestionably was his duty to have communicated his knowledge and belief on this point to sir Robert Wigram, unless the court is prepared to say that a vendor is justified in knowingly palming a defective title upon an unsuspecting purchaser.

March 16.—The Lord Chancellor. According to my present impression, I cannot but think that all the parties are responsible for the acts of Mr Street, the solicitor for the plaintiffs. As Mr Street acted as the agent for all these parties, it would be injustice to the purchaser, who treated with them all through the agency of Mr Street, if they were not to be bound by his acts.

I think the question resolves itself into this, whether or not there was any concealment. According to my present impression, from the affidavits made by Mr Street, he does not deny the charge, or attempt to deny it. His attention was directed to the circumstance which affected the title; and the fair inference to be drawn from his affidavit is, that, his attention having been directed to it, he either purposely abstained from

examining the register, or did examine the register and ascertained the facts, which are now admitted to have impeached the title. That being the case, I think the parties responsible for what he did: and to say that, under these circumstances, there is still to be another reference to the Master for the purpose of determining whether the title can now be made good, is more than, under any rule or practice of this court, the vendors are entitled to expect.

March 18.—The Lord Chancellor. This sale took place in 1813; and the abstract of title was delivered towards the close of the same year. Mr Whitton, the solicitor of the purchaser, sir Robert Wigram, upon perusing the abstract, found, that a part of the property had been purchased by John Carter after the execution of his will; and he wrote to Messrs Street and Wolfe, the solicitors for the plaintiffs in the cause, mentioning that circumstance, and saying that it would be necessary to satisfy him that Nicholas Carter was the heir-at-law of John. In answer to this, a letter was written from Mr Street's office, stating that Nicholas was the brother and heir of John; and adding circumstances which confirmed that representation. This led to another letter from Mr Whitton, in which he required the certificates of registry of the marriage of the parents of John and Nicholas, and of the baptism of the two sons; the entry of the marriage, it was answered, could not be found, but the certificates of baptism were furnished: and there the matter rested. Other objections being made to the title, nothing further was said with respect to that particular objection. These other objections to the title were all cleared up in the year 1824: and, in 1825, the draft of the conveyance was delivered to the vendors, and was approved on their behalf.

Shortly afterwards, a communication was made to sir Robert Wigram, that, in point of fact, Nicholas Carter was not the heir-at-law of John; but that there had been an intermediate brother, who had left issue. This circumstance, as soon as it was made known to sir Robert Wigram, was communicated to Mr Whitton, his attorney, who instantly sent his clerk to St Giles, Cripplegate, to search the registry; and it was then ascertained, without the slightest difficulty, that, in point of fact, there was an intermediate brother, George, who had left issue, George and John; that George had died early in infancy; and that John was the heir at law. This led to a renewed controversy here; and that controversy terminated in another reference of the title to the Master. The Master examined into all the circumstances, was satisfied that the objection was a good objection, and reported against the title. The parties in the suit took exceptions to that report. In the meantime, they cleared up the difficulty by purchasing the interest of John: and they now pray, that, the difficulty being thus removed, another reference may be made to the Master for the purpose of seeing whether the title is not now perfect, in order that sir Robert Wigram may be compelled to complete his purchase. It may be observed that the title was made perfect before the exceptions came on to be heard: but that makes no difference.

One point which has been agitated at the bar is this, that, whatever Mr Street may have done, these parties are not responsible for his acts. I think it is quite impossible to sustain such a position. Mr Street was originally the solicitor for the plaintiffs; but, with reference to the purchase and sale, he must be considered as acting for all the parties in the cause: and it would be hard indeed upon a person contracting to purchase,

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if the solicitor, under these circumstances, were not to be considered as the agent of all the parties, and if all the parties were not responsible for his acts; because, in that case, if he committed fraud of any description, the only remedy of the purchaser would be against the solicitor; and he might still be compelled, under any circumstances, to perform his contract. Mr Street, or Messrs Street and Wolfe, acting in this business as agents for all the parties, all must be bound by his acts: and the question comes to this, what was the conduct of Mr Street in the transaction?

Now, Mr Street swears most positively, that, when the abstract was delivered, he was not aware of this defect in the title, and considered Nicholas Carter to be the heir-at-law of John. He confines, in the first instance, his affidavit to that particular time—the time when the abstract was delivered. However, in the subsequent part of the affidavit, he goes further, and the manner in which that part of the affidavit is sworn is remarkable. He says, "that he never was informed by any of the parties, or in any other way, that there was any brother of the said John Carter older than the said Nicholas Carter, or that such brother George had left any issue, until *several years after* the estates were sold, and *long after* the deeds of February and May 1816, and the fines levied in pursuance thereof, were made and levied to the trustees."

Now, the estates were sold in the year 1813. He was not aware, he says, of the fact of there having been a brother of John Carter older than Nicholas, until *several years after* 1813; that would be satisfied by his having discovered those facts in the year 1817 or 1818. He then adds, that he was not aware of the circumstance until *long after* the deeds of February and May 1816 were made; and that would be satisfied also by his having discovered the fact in the year 1817 or 1818. The alteration in the phraseology is remarkable: for he says in the first instance, that he did not discover the matter "until several years after the estates were sold;" but, when he comes to refer to the date of the deeds of February and May 1816, he does not say "several years after the execution of those deeds," but "long after;" so that the whole of his affidavit is reconcilable with the supposition of his having made the discovery in the year 1817, or the year 1818.

Mark how that corresponds with the affidavit of Price. Price swears that he heard from Dalby, that Dalby, about ten years before (the affidavit is sworn in 1827,—which carries it back to the year 1817), had a conversation with Street, and, in that conversation, was complaining of the delay which had taken place in bringing the affairs of Nicholas Carter to a final settlement; that Street explained, that the delay arose from the circumstance of Mr Whitton requiring an heir-at-law of Nicholas Carter; and that there was an heir-at-law, but, if that heir-at-law were produced, he might claim a considerable part of the freehold property. Mr Street does not deny the conversation with respect to the delay which had taken place; he does not deny that there was a conversation with respect to the heir-at-law; but he says that it amounted to nothing more than this, that he stated that he had heard of a rumour that Nicholas Carter had an elder brother George. Now, as Mr Street admits that a conversation did take place, directing his attention to an heir-at-law, and as he does not take upon himself to swear that he did not know about that time, or as early as that period, that there was an elder brother of Nicholas, who had left issue, we must infer, and it is contrary to every principle of judicial proceedings not to infer, that about that time he did know of the fact. The

probability is (for he does not state that he did not direct the registry to be searched), that, when this point was first brought under his attention, he caused the registry to be searched, in order to ascertain the fact; and, if he had searched the registry, it is quite obvious, from the affidavits in the cause, that he must, without the slightest difficulty, have discovered, that Nicholas Carter was not the heir of his brother John. Independently of this, as Mr Street does not say when he first learned that there had been an elder brother of Nicholas, who had left issue, we must take it for granted that he discovered it during the discussion of the other objections to the title.

Now, Mr Street having represented, in the first instance, that Nicholas Carter was the heir-at-law of his brother John, and having, during the progress of the discussion on the other points, discovered that in that respect he was mistaken, and that another person was the heir-at-law, it was his duty, in fair and honest dealing, to have communicated that circumstance to the purchaser: and, he not having communicated that circumstance to the purchaser, and the purchaser having, after the other objections to the title had been cleared up, discovered it by accident in consequence of a communication from another quarter, and this court having determined, upon exceptions to the Master's report, that it constituted a good objection to the title—it appears to me quite impossible that the parties in this suit, if they are bound by the acts of Mr Street, have any equity to come into this court, to say that a further reference should be directed to the Master for the purpose of ascertaining whether a good title can, or not, be now shown; for it is quite obvious, that, if this discovery had not been made, the vendors would have forced the purchaser to have taken the title such as it was, knowing that defect to have existed in it which has since been discovered.

Under these circumstances, it is quite impossible that the purchaser can be held to his contract; the application, therefore, made on the part of the vendors, must be refused, with costs.

Coster *v.* Turnor.

Russell and Mylne, 311.

Under a decree directing the sale of an estate, which, as against T., one of the defendants, was only a decree *nisi*, and before the decree was made absolute, the estate was sold, and A. was reported the purchaser; afterwards, on the application of A., an order was made by the Vice-Chancellor discharging him from the purchase, on the ground that the decree was not absolute as against T.; the plaintiff immediately gave notice of a motion before the Lord Chancellor to discharge that order, and, that motion having stood over a considerable time, the decree was made absolute as against T., before it was heard; Held,

That the purchaser was entitled to be discharged at the time when the application was made, and that he, having been once discharged by an order which was right at the time when it was pronounced, the contract could not be revived by the proceedings subsequently taken by the vendor to make the decree perfect.

B., by the directions of a solicitor who was then concerned for a defendant T., had acted as clerk in court for T., and in 1816 filed his answer; after that time T. was generally resident abroad; in 1822 an order was made directing that service of the subpœna on his clerk in

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court should be good service; at the hearing in 1823 no person appeared for T., and a decree *nisi* was pronounced against him; in 1829, the solicitor, upon an application made to him by the plaintiff, declined to receive a notice on behalf of T., stating that he had long since ceased to be concerned for him, and that he knew not where he was, nor whether he was living or dead; in 1829 the plaintiff obtained an order that service of the subpœna to show cause against the decree on the clerk in court of T. should be good service; and the subpœna was served on B., who had not for many years done any act as clerk in court for T.: Held,

That B. was to be considered as still the clerk in court of T., and that the service of the subpœna was strictly regular.

Feb. 24, 27, March 31, 1830.

THE plaintiff, William Coster, in 1815, being mortgagee, with power to sell, of certain premises which were subject to two prior mortgages, filed his bill, praying a sale, against Exuperious Turnor the mortgagor, the two prior mortgagees, and several subsequent incumbrancees. Turnor put in his answer in 1816; various proceedings were had, the cause was set down for hearing, and the plaintiff, not being able to serve a subpœna to hear judgment on Turnor personally, in consequence of his absence from England, obtained an order that service of the subpœna on his clerk in court should be good service. Mr Vizard was Turnor's solicitor in the cause. Mr Vizard employed Mr Baines as his clerk in court; and Mr Baines in this suit acted as clerk in court for Turnor. The subpœna to hear judgment was served on Mr Baines.

The cause was brought to a hearing on the 15th of February 1823, when, Turnor not appearing, a decree was pronounced, which, as against him, was only a decree *nisi*. It purported to have been made in the presence of counsel for the plaintiff, and all the defendants, except E. Turnor, for whom it was stated no one had appeared, though his clerk in court had been served with a subpœna to hear judgment, and with an order directing that service of the subpœna on the clerk in court should be deemed good service on the defendant: it directed various accounts, and ordered, among other things, that the estate should be sold, provided the plaintiff should, within six months after the Master had made his report, pay off the two prior mortgagees, or obtain their consent to a sale; and it concluded with the usual declaration, that it was to be binding on Turnor, unless he, on being served with a subpœna to show cause against the same, should, at the return thereof, show good cause to the contrary.

The Master made his report; the plaintiff or his solicitor prevailed on a friend to pay off the first two mortgagees, and took an assignment of their incumbrances: and, on the 25th of August 1828, the property was put up for sale under the decree, when Mr Crowdy purchased it at the price of 12,400*l*. He was subsequently reported the purchaser, and the report was confirmed.

In the course of the investigation of the title, it turned out that no steps had been taken to make the decree of February 1823 absolute against Turnor, and that no subpœna to show cause had been served. On this ground a motion on behalf of Crowdy was made on the 8th July 1829, before the Vice-Chancellor, that he might be discharged from his purchase; and the Vice-Chancellor ordered that he should be discharged from it.

On the 10th July 1829, the plaintiff gave notice of a motion before the Lord Chancellor, to rescind the order pronounced by the Vice-Chancellor.

Before this motion could be made, the plaintiff, on the 13th July 1829,

by an ex parte petition at the rolls, obtained an order, that the plaintiff should have leave to serve a subpœna requiring the defendant Turnor to show cause against the decree, and that service of the subpœna on Turnor's clerk in court should be deemed good service on Turnor. In the course of this proceeding, Mr Vizard declined to receive a notice which the plaintiff sent to him as solicitor for Turnor; and stated that he was no longer concerned for Turnor, and did not know where he was, or whether he was living or dead. However, the subpœna was served on Mr Baines; no cause was shown at the return of the writ, and the decree was made absolute. It was stated at the bar, that the affidavits did not show that the subpœna to show cause had been served on Mr Baines, and that the decree had been made absolute: but the plaintiff offered, if these facts were doubted, to have them properly verified.

An attempt was afterwards made, but without success, to discharge the order of the 13th July 1829, as irregular.

In this state of circumstances the motion to discharge the order of the Vice-Chancellor came on. In the discussion several topics were introduced, which ultimately did not affect the decision; the purchaser, on the one hand, alleging that various irregularities had been committed in the progress of the suit, which would enable any of the parties to overturn the decree under which the sale had been made: and the plaintiff, on the other hand, contending that the purchaser had done acts which amounted to a waver of that objection, by which he now sought to escape from his contract. But the point principally argued, and on which alone the decision turned, was, whether the circumstance that the decree was not, at least at the time when the Vice-Chancellor pronounced his order, binding upon E. Turnor, constituted a sufficient ground for discharging Crowdy from his purchase.

Mr Horne and Mr Temple, for the motion, contended that there never was any ground for discharging the purchaser, because the defect, which was alleged to exist in the decree, was a mere matter of form, which the plaintiff could at any time supply by his own act. The purchaser might call on him at any time to supply it, in the same manner as he might require him to get in a legal estate which was outstanding in a trustee; and if the defect was cured within a reasonable time, the purchaser had nothing more to demand.

The only objection to the decree in the present suit was, that, as E. Turnor did not appear at the hearing, it was not final against him, and that according to the practice of the court, he might, at a future time, procure it to be reversed. But the same rules of practice which gave him that privilege, prescribed certain forms, compliance with which put an end to the privilege, and rendered the decree as final and conclusive against Turnor, as it previously was against the other defendants. These forms had been complied with; the decree had been made absolute against Turnor. It must be admitted, that, if the decree had been made absolute before the sale took place, the objection could not have existed: yet the purchaser, in that state of things, would confessedly have been in a situation not a whit more secure or advantageous than that in which he actually was. It was not pretended that there had been any fraud or concealment. The plaintiff had acted throughout *bonâ fide*.

The Solicitor-General (sir E. Sugden) and Mr Roots, for the purchaser, argued that, inasmuch as the decree was not a valid and binding decree at

the time when the proceedings took place in the Master's office, the sale itself was irregular, and the contract was *ab initio* such as the court would not sanction; and nothing that was done subsequently could make the sale regular, or the contract binding. The decree *nisi*, directing a sale, could not be acted upon, till it was made absolute. While it remained merely a decree *nisi*, it gave no authority to proceed to a sale: until Turnor either had shown cause, or, after due service of the subpœna, had neglected to do so, nothing could be done under it. The plaintiff omitted to make the decree absolute; but he proceeded to do those acts which the decree could authorize him to do only when it was made absolute; and he now expects the court to say, that what he thus did was done regularly and properly.

It is alleged that he has since cured the defect; but the defect is such as does not admit of cure. The objection is, that, at the time of the sale, no decree was in force, which authorized a sale to be then made. In Lechmere *v.* Brasier, 2 Jac. & Walker, 287, a similar objection prevailed; and the purchaser was discharged, though the parties in the cause were proceeding to remedy the defect.

Besides, the decree was defective, not only at the time when the proceedings took place in the Master's office, but when the motion was made before the Vice-Chancellor, and when notice of the present appeal-motion was given. When the question was argued before the Vice-Chancellor, the decree was admitted to be merely a decree *nisi*: no person could say whether it would ever be made absolute, for it was impossible to foretell whether Turner might not show good cause against it: and it would be extravagant to contend, that a purchaser (even if the objection could have been remedied by matter *ex post facto*) was to abide the result of that contingency. The order of the Vice-Chancellor, therefore, was clearly right: if the present motion had been argued on the day for which notice of it was given, things would have been in the same state. Could the result be different, because the appellant had delayed to bring the motion on, and, in the mean time, had taken certain steps with a view to alter the situation of the parties?

In truth, however, those steps were nugatory. He got an order that service of the subpœna on Turnor's clerk in court should be deemed good service on Turnor; and it is said that the subpœna was served on Mr Baines. That proceeding was a mere farce: for, at that time Mr Baines was not the clerk in court of Mr Turnor: Mr Baines was clerk in court for Mr Vizard, who had been Turnor's solicitor; and by Mr Vizard's directions, and on his responsibility, he had formerly acted as clerk in court in this cause for Turnor. But Mr Vizard had long ceased to be concerned for Turnor: he did not know where he was, or even whether he was alive or dead: and, when applied to by the plaintiff, he declined to receive a notice as agent or solicitor for Turnor, and refused to permit himself to be considered as in any way representing that gentleman. Under these circumstances, Mr Baines, who had no authority except through Vizard, was no longer *de facto* the clerk in court of Turnor, and could not be so considered.

Sir Charles Wetherell and Mr Sidebottom, on behalf of some of the defendants, insisted on their right, and were allowed to be heard in opposition to the motion. They cited Agnew *v.* Lord Stair, in the house of lords.

Mr Horne, in reply, observed, that Mr Baines, having once been ap-

pointed clerk in court in the cause for Turnor, must be held still to continue to represent him. The strict regularity of the proceedings, which had been taken to make the decree absolute, was established by the Master of the Rolls's dismissal of the application to discharge the order, which directed service of the subpœna on the clerk in court to be good service; and the decree, when once made absolute, would operate from the time when the decree *nisi* was pronounced.

Lechmere *v.* Brasier had not the slightest analogy to the present case. In Lechmere *v.* Brasier the decree was erroneous; here the decree was perfectly accurate; it would have been erroneous, had it been in form or substance different from what it actually was. In Lechmere *v.* Brasier it was uncertain whether there ever would be a valid decree directing a sale, and whether the plaintiffs would establish a case entitling them to such relief: here all that remained to be done, was to make the decree absolute against Turnor; the plaintiff could at any moment take the steps necessary for that purpose; the decree and *de facto* has been made absolute.

In the course of the argument the Lord Chancellor observed, that in Lechmere *v.* Brasier there was a substantial objection to the decree, arising out of the facts of the case: these facts still remained to be investigated, and the result of the investigation might have been extremely prejudicial to the purchaser. There the plaintiff had not proved that the testator was a trader within the meaning of the bankrupt laws; and until that act were established, the court had no authority to decree a sale: here the objection was purely personal, and arose out of the circumstance that the decree was a decree *nisi*, which the plaintiff had it in his power to make absolute; it was like the ordinary case of a defect of title, which the vendor has the means of remedying by his own act.

March 31, 1830.—The Lord Chancellor. The question arises upon a sale in the Master's office under a decree of this court, pronounced in 1823. A person of the name of Crowdy was declared to be the purchaser; and afterwards an abstract of title was sent to him or his solicitor, which stated, among other documents, the decree of 1823. It turned out, on further inquiry, that this decree was a decree *nisi* only: but it does not appear from the affidavits, or from the circumstances of the case, that there was any intentional deception in that representation of the decree which was made when the abstract was sent to Mr Crowdy. This discovery being made, Mr Crowdy objected to the title, and according to the statements contained in the affidavits, nothing was done by him afterwards to waive the objection. The case came on before the Vice-Chancellor, and the Vice-Chancellor was of opinion, upon the authority of Lechmere and Brasier,—not upon the facts of the case, but upon the principle and doctrines stated there,—that, under such circumstances, Mr Crowdy was entitled to be discharged from his contract of purchase.

That decision having been pronounced by the Vice-Chancellor, notice was given of an application to be made to me, within a few days afterwards, to discharge his honour's order. The facts and circumstances at that period were precisely the same as they were when the case was argued before the Vice-Chancellor; and I am of opinion, that, under this state of things, as they then existed, the decision of the Vice-Chancellor was correct, and that there was no ground whatever to discharge the order pronounced by him.

[Coster v. Turnor.]

It has been suggested, however, that while the motion was pending before me, a subpœna had been served on Mr Baines, formerly clerk in court to Mr Exuperious Turnor, who appears to have been abroad; and that upon the service of the subpœna, and the expiration of the time for showing cause, the decree has now been made absolute. Mr Vizard, who was originally concerned for Mr Exuperious Turnor, employed Mr Baines as his clerk in court: but Mr Vizard has for several years ceased to be at all concerned for Mr Exuperious Turnor. Still, however, I believe that, in strictness, the service on the clerk in court, Mr Baines, was a regular and proper service. He was the clerk in court of Mr E. Turnor, the party in the cause: and that authority never having been countermanded, must be considered as an existing authority. That he was served with a subpœna, and that the decree has since been made absolute, does not appear by any of the affidavits which have been handed up to me; but I understand the fact is so; and if it would authorize me to discharge the order, probably I should think it right to give an opportunity of filing further affidavits.

But I am of opinion that I ought to decide the case as it stood when the motion was originally brought before me. At the time when notice of the application to me was given, the facts were precisely in the same state as they were when the case was heard before the Vice-Chancellor. Now, the purchaser having, upon an application to the Vice-Chancellor, been once discharged from the contract, upon a ground which was then sufficient, and an application being almost immediately afterwards made to me, and the position of things being such that I should have refused the motion if then made, it would not be just, in consequence of that motion standing over, and the defect of the title having been repaired, if in point of fact it has been repaired, again to revive the contract which had been rescinded by the Vice-Chancellor.

The motion must be refused, with costs.

Nov.—As the judgment pronounced by the Lord Chancellor on the 31st of March was considered by the plaintiff's counsel to be at variance with the opinions which his lordship had thrown out incidentally in the course of the argument on the motion, and therefore came upon them in some measure by surprise, the plaintiff was induced to make an application for the purpose of having the whole subject once more brought under his lordship's review. The motion was accordingly re-heard during the sittings before Michaelmas term; and upon that re-hearing the questions raised on the former discussion were again very fully argued.

Nov. 22.—The Lord Chancellor delivered to the parties his written judgment, affirming the order which he had previously made.

Acraman *v.* Bristol Dock Company.

Russell and Mylne, 321.

An injunction allowed to be moved for ex parte, in a pressing case, after the defendants had entered an appearance.

In this case counsel having been instructed to oppose the motion, although no notice had been given, the court allowed them to be heard.

March 2, 1830.

THE Solicitor-General and Mr Bigg moved ex parte on bill and affidavits for a special injunction to restrain the Bristol Dock Company from letting off the water from the docks, the following morning, as the company threatened and intended to do, for the alleged purpose of cleansing them. The defendants had entered an appearance gratis, immediately on the filing of the bill; but it was not stated, nor did it appear, that they had been served with subpœnas at the time when the motion was made; although there was reason to believe that such was the fact, instructions to that effect having been forwarded, the day before, to the solicitor at Bristol.

Sir Charles Wetherell now, on behalf of the Dock Company, contended, that, having appeared, they had a right to the usual notice. On argument, however, by the Solicitor-General, who referred to a case in Vesey(*a*), insisting that no such rule existed, and that it would give parties an easy opportunity of defeating pressing cases for injunction, the objection was overruled.

The Solicitor-General then insisted that this being in fact an ex parte motion, the defendants were not entitled to be heard by counsel: but the Lord Chancellor overruled that objection also; and sir C. Wetherell and Mr Pemberton were heard for the Dock Company.

The question turned upon the construction of the acts of parliament constituting the company, and upon the effect of a number of affidavits which were fully gone into: and ultimately the injunction was refused.

(*a*) Allard *v.* Jones, 15 Ves. 605. The general rule is, that after the defendant has appeared, a special injunction can be moved for only upon notice; Marasco *v.* Boiton, 2 Ves. S. 112; Harrison *v.* Cockerell, 3 Mer. 1; Collard *v.* Cooper, 6 Mad. 190; Perry *v.* Weller, 3 Russ. 519, in which a distinction is taken between a gratis appearance and an appearance entered upon service of the subpœna: but an exception seems to have been sometimes made, without reference to that distinction, where the threatened mischief is imminent, and would be irremediable. Lord Eldon's dictum, 3 B. C. C. 477, n.; Collard *v.* Cooper; Harrison *v.* Cockerell; Allard *v.* Jones, and the principal case. As to the necessity for serving the defendant with a subpœna, see Attorney-General *v.* Nichol, 16 Ves. 338; Patrick *v.* Harrison, 3 B. C. C. 476, and the cases referred to in Mr Belt's note.

Gray *v.* Campbell. Smith *v.* Campbell.

Russell and Mylne, 323.

Order made ex parte to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs.

The like order made ex parte without payment of costs, on certificate that the bill had been amended since the contempt.

Feb. 25, March 6, 1830.

IN the first cause the defendant Campbell moved that he might now, on tender of costs to be taxed and certificate of answer filed, be discharged out of custody for contempt;—which was ordered.

In the second cause the Solicitor-General moved ex parte that the defendant Campbell, who was a prisoner in the Fleet for contempt in not answering the original bill, might be discharged without payment of costs. Subsequently to his commitment, the plaintiffs obtained an order to amend their bill, and on a certificate of the six-clerk that the amendments were actually on the file, the present application was made. The motion for the discharge of a party in contempt, on his answer being put in, the Solicitor-General remarked was an ex parte motion, and this, he contended, was a stronger case.

The Lord Chancellor, after considering the point, made the order ex parte.

The following case was afterwards furnished by Mr Bedwell the registrar.

Ball *v.* Etches.

Russell and Mylne, 324.

THE plaintiff filed his original bill, and the defendant got into contempt for want of an answer. The answer was ready, but before it was filed, the plaintiff amended his bill, so that the clerk in court could not receive the answer to the original bill; and it being considered that the plaintiff had by his own act purged the defendant's contempt, the defendant moved at the rolls that he might be discharged. The practice being considered new, the motion was made next day at Westminster before lord Eldon, when his lordship, after consideration, granted it. The clerk in court issued a certificate of the bill being amended.

Reg. Lib. B. 1817, fol. 7.

Nov. 13, 1817.

Mendizabel *v.* Hullett.

Russell and Mylne, 324.

ON the allowance of exceptions to the answer, leave given ex parte to the plaintiff to amend his bill, although it had been previously amended.

March 4, 1830.

Bird *v.* Hustler.

Russell and Mylne, 325.

THE thirteenth of the new orders does not apply to amendments made upon exceptions to the answer being submitted to or allowed: nor does it apply to amendments made before any answer is put in: but in all cases to which it does apply, notice is necessary as well as an affidavit, unless the court upon the particular circumstances dispenses with it.

May 13, June 13, 1831.

Anon.

Russell and Mylne, 330.

AN accountant who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs.

March 6, 1831.

Ferguson *v.* Tadman.

Russell and Mylne, 331.

WHERE an order directing money to be paid out of court is appealed, the accountant-general is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings to the court below.

March 6, 1830.

White *v.* Hall.

Russell and Mylne, 332.

A party permitted to intervene as a defendant in a cause after it had been heard on further directions, he having been out of the jurisdiction during the previous proceedings, and now submitting to be bound by them.

March 6, 1830.

THIS was a suit instituted on behalf of infants interested under the will of sir H. White, against the executors of the will, who were also the guardians of the infants, to have the usual accounts taken, and the property of the infants ascertained and secured. A decree had been made directing the usual inquiries: the cause was afterwards heard on further directions, and an allowance approved of for the maintenance of the children.

Mr Pepys now moved, on behalf of the father of the infant children, Mr H. White, who had been named one of the executors by the will, and who had recently returned from India, where he had resided ever since the filing of the bill, that an appearance might be entered for him with the registrar, he consenting to abide by the decree already made in the suit, and submitting to account, if required; or upon such other terms as the court might think fit to impose. The Vice-Chancellor had refused the motion.

In support of the application, an affidavit of Mr White was read, in which he stated that the suit was still pending: that since his return to England he had taken steps for proving the will, and that he was now desirous of undertaking the charge of the maintenance and education of his children, and of watching over and protecting their interests. The following cases were referred to. Pitt *v.* Brewster, 1 Dick. 37; Banister *v.* Way, 2 Dick. 686; Capel *v.* Butler, 2 S. & S. 457; and the *dicta* of lord Thurlow in Harford *v.* Browning, 1 Cox, 307.

Mr Phillimore, on behalf of the defendants, the other executors, opposed the motion. He observed, that in none of the cases cited, had the cause been heard on further directions at the time of the application. To allow a new party to intervene in the proceedings in the Master's office, at so late a stage, would be both unnecessary and expensive. In such circumstances, the benefit of the decree could only be obtained by a supplemental bill.

The Lord Chancellor, remarking that a supplemental bill would probably be much more expensive than the course proposed, said, it was true that in none of the cases cited a decree on further directions had been made; but though this cause had advanced a stage further, there did not appear to him to be any difference in principle between the case in Dickens and the present. The object was not to unravel the accounts, but simply that, as to the future proceedings, the party applying might be placed in the same situation as if he had been a party from the first; and there seemed to be no objection to such a course. If, therefore, Mr

[White *v.* Hall.]

White submitted to be bound by the decree and the accounts as they now stood, he ought to appoint a clerk in court, who should be at liberty to enter an appearance for him.

Walmsley *v.* Froude.

Russell and Mylne, 334.

Where the plaintiff's solicitor, merely through ignorance or mistake, has neglected to comply with the exigency of the 17th order, the court will not relieve the plaintiff, upon terms, from the penal consequences of the neglect, without the consent of the other party.

March 6, 1830.

THE Solicitor-General and Mr Spence, on behalf of the plaintiffs, moved that publication in this cause might be farther enlarged, and that the plaintiffs might be at liberty to sue out a commission for the examination of witnesses, returnable without delay, with the usual directions, &c.

It appeared from the affidavits that, on the first seal after Hilary term 1829, the plaintiffs entered into the peremptory undertaking to speed, and it was ordered that they should go to commission and execute the same in Hilary vacation, and give rules to pass publication in Easter term, and that the cause should be set down in Trinity term following. On the 13th of March, a copy of that order was served. Interrogatories were accordingly prepared and sent down for revision to the country, and on the 2d of April the plaintiffs were advised on the subject. On the 5th of April the draft interrogatories were received by the plaintiffs' solicitor, but no commission was sued out by him, nor did he take any farther steps in the cause prior to the 6th of May, the first day of Easter term, when he came up to London. On the 27th of May, the defendant proceeded to the examination of his witnesses, and publication was afterwards enlarged till the first day of Trinity term (19th June), in order that the plaintiffs might have an opportunity of cross-examining. In explanation of his apparent neglect, the solicitor for the plaintiff in his affidavit stated, that in the month of April he had been much occupied with other business; that when informed that the time for publication expired on the last day of Hilary vacation, he was completely taken by surprise; that he had not at once directed his town agents to sue out the commission, because he was for some time unable to obtain the information necessary for settling the interrogatories; that when he did obtain it, and had got the interrogatories prepared, he found that as several of the witnesses lived at considerable distances, it would be impossible to have it executed and returned within the time limited by the order, and he had, therefore, not thought it advisable to incur a useless expense.

For the plaintiffs it was urged, that the refusal of this application would be attended with very great hardship, and would in fact render the suit nugatory. The plaintiffs were willing to offer any terms, and to pay all the costs occasioned by the delay and the motion: the indulgence sought would not delay the suit for a single hour, as the cause, though set down, could not come on for hearing in the regular course, till long after the return of the commission. It was a plain case of mistake; if the motion

were not granted, they must either go to a hearing without any evidence, or dismiss their bill.

The Lord Chancellor said it was a very hard case, and asked sir Charles Wetherell and Mr Cooper, who appeared for the defendant, whether they would accede to the plaintiffs' offer, which they declined, alleging that the conduct of the plaintiffs entitled them to no indulgence. The motion, they observed, was directly in the teeth of the seventeenth of the new orders, which might as well be abandoned altogether, if so direct a violation of their letter and spirit were allowed.

The Lord Chancellor. The object of this order was to prevent delay in hearing the cause: here there are two months of delay, from April to June, altogether unaccounted for. The Vice-Chancellor thought that if ever the rule was to be acted upon, it must be acted upon in this instance; and if the other party will not accede to the plaintiffs' proposal, I must agree in that opinion, however much I regret it.

Motion refused, with costs.

Grafton *v.* Griffin.

Russell and Mylne, 336.

Where the plaintiff has by tortious means got into possession of property, pending a suit to establish his equitable title to it, the court will not stay legal proceedings against him for the recovery of possession.

March 6, 9, 1830.

THE will of a testator contained the following clause: "I direct that the present tenant of the said copyhold and premises, or any of his children desirous of being continued therein, be suffered to hold and keep the said premises, upon payment of the present rent and the taxes and levies which the said present tenant has been accustomed to pay; and also all after taxes and levies to be assessed on the said premises, or any part thereof, during the time he or they shall respectively be tenant or tenants of the same; upon entering into proper agreements not to commit any waste, or do any damage to the said estates by sowing the same with flax, hemp or woad, or by any other means whatsoever."

Mr Knight, on behalf of the plaintiffs, who were the daughters of the first tenant, and one of whom was a married woman, moved for an injunction to stay proceedings in an action of ejectment brought by the defendant, the landlord, which stood for trial at the next assizes. He made the application on the ground that the interest of the plaintiffs was a trust only, not furnishing a good defence at law, and that as the married woman was not able strictly to fulfil the condition by entering into proper covenants, equity would interfere to modify and regulate the devise, and relieve her from a forfeiture.

[Grafton *v.* Griffin.]

The Vice-Chancellor had refused the motion.

The Solicitor-General and Mr Wakefield opposed the application, contending that the devise was void for uncertainty, or at all events was exhausted by the tenant and his son having successively had the benefit of it; Greenwood *v.* Tyler, Hob. 314; that the defence, if good, might be used at law; and that the conduct of the plaintiffs in turning out their brother's widow, before giving notice of their claim to the landlord, did not entitle them to any assistance in a court of equity.

March 9.—The Lord Chancellor. The bill states, that after the death of the former tenant in March last, the plaintiffs entered into possession. In the following July a notice was given, expressing their readiness to comply with conditions corresponding to those required under the will. It is not stated whether that notice was given before or after their forcible entry, but from the statement, I should rather assume that it was given after. That fact must have been in the knowledge of the plaintiffs, who, if it were given before, ought to have so stated. The answer denies that any of the plaintiffs but Grafton (who is the husband of one of the daughters) is in possession; and his possession, it alleges, was obtained by a forcible entry, and by turning out the widow. This court will not interfere to support a possession so acquired. It was said the court would not allow the possession to be changed, pending a suit to determine the right; but the party himself has changed the possession by his own act, and the court will not interfere in such a case to prevent the other party from recovering, if he can, at law, the possession, of which he has been forcibly deprived.

Motion refused, with costs.

Greig *v.* Somerville.

Russell and Mylne, 338.

In a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the Master reported that no debts had been proved; and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained and carried to his separate account. In 1825, a foreign prince claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in court; and the plaintiff, coming of age soon after, applied to have that sum paid out: Held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the Master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in court, to that proportion which the plaintiff's share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff.

March 4, 13, 1830.

THE intestate, who had filled the office of Russian consul in London, died in the year 1807. A bill was filed in May 1814, by his infant children against the administratrix, the widow, who had married again, to

[Greig v. Somerville.]

have the usual accounts taken, and praying, among other things, that the plaintiff, W. Greig, as one of the intestate's two children, might be declared entitled to one-third part of the clear residue of the personal estate in his own right. The usual reference having been directed at the hearing, the Master, in June 1817, made his report, stating that he had caused advertisements to be published in the London Gazette and certain newspapers for creditors, but that no creditor had come in and proved any debt. On the 21st of June 1817, the cause was heard on further directions; and under the decree then made, the costs were paid, and the whole of the fund apportioned and distributed. As the plaintiff was then an infant, his share (which, in consequence of his brother's death, became augmented so as to amount to four-ninths of the whole fund) was carried over to his separate account, and an annual allowance for his maintenance and education was directed to be paid out of the dividends.

In March 1825, an application was made by petition on behalf of the ambassador of the emperor of Russia, praying he might be at liberty to go in before the Master, and prove a debt alleged to have been due from the intestate to the emperor, and that the 21,000*l.* bank three per cents, standing to the infant plaintiff's account (the only part of the intestate's estate then remaining in the name of the accountant-general), might not be sold until the Master should have made his report: and the Vice-Chancellor made an order accordingly. A petition of appeal was afterwards presented against that order, and on the 26th July 1825, the appeal came on to be heard before lord Eldon, C., when the question which it raised was fully argued. Before any judgment was given, however, the plaintiff attained his majority, and he thereupon, in November 1826, presented another petition to the Lord Chancellor, praying that the stock and money standing to his separate account, or such part thereof less than the whole, as his lordship might think just, with reference to the claim on behalf of the Russian government, might be transferred and paid to him. Upon the latter of these petitions his lordship directed, that the sum of 8000*l.* should be paid to the plaintiff, there being still a fund in court, standing in his name, which was amply sufficient to cover the amount of the demand. But upon the appeal-petition, although the matter was several times mentioned and discussed, his lordship expressed considerable doubts, and eventually he resigned the great seal without having made any order on the subject; and it now became necessary to have the appeal reheard. An application by the plaintiff, that the whole of the fund, standing to his separate account in the cause, might be transferred and paid over to him, was brought on at the same time with the appeal.

The Solicitor-General, Mr J. Martin and Mr J. Parker, for the plaintiff.

This claim is barred by the statute of limitations; for the six years have run, at least twice over, since the debt was contracted. It does not appear when the demand first arose; probably long prior to the intestate's death: but the emperor has subsequently permitted nearly twenty years to elapse without taking legal steps to assert his right, and it was only within these few months that documents, which it is pretended are to substantiate the claim, were transmitted from Russia to his representatives here. He must have known of the intestate's death, for he immediately filled up the vacant office; and then was the proper moment to have the accounts of the deceased consul investigated, and the defalcation, if any, ascertained and made good. There can be no reason why the statute

should not run against a foreign potentate as well as against the king's subjects(*a*). His imperial majesty was in England in the summer of the year 1814, the very time when proceedings in the cause were going on before the Master; and from the year 1807 downwards, he has never ceased to be represented in this country by agents, who might, and if it had been valid, certainly would have prosecuted the claim. Why did they lie by till all the papers and vouchers by which the demand might be rebutted or shown to be satisfied were likely to be lost or destroyed? They could have no difficulties with respect to evidence; for they might easily have compelled the attendance of witnesses from Russia, and have commanded every facility for establishing their right; an advantage which the plaintiff could not expect.

Independently of the statute, it is far too late for the petitioner to bring forward so stale a claim after suit has been wound up, and the property completely and finally distributed under the decree. The advertisements inserted in the London Gazette, and other papers, to which he has paid no attention, have concluded him; for the fund having once got home, as it did by being placed to the plaintiff's separate account, the court will not now interpose to recall it. A case of this kind has occurred:—An estate was sold under the order of the court, and the purchase-money, when paid in, was carried to the account of the cause: sometime afterwards, but before the money was distributed, the purchaser was threatened with eviction, and he thereupon applied to prevent the price, which was still standing in the name of the accountant-general, from being paid out. The court however said "No: as far as you are concerned the transaction is final, and you must therefore take what rights and remedies you can obtain under your conveyance"(*b*). In like manner here, the suit, for all the general purposes of administration, was at an end; and the appropriation, made according to the usual practice, was merely with a view to protect and secure the infant's interests. Nor can the petitioner be allowed to convert a proceeding, originating in the accident of the plaintiff being then under age, and intended for his benefit, into an instrument of attack and oppression.

This claim would never have been heard of had the share of the plaintiff, like that of the widow, once found its way into the owner's hands. The administratrix, on receiving her distributive share, had her costs paid out of the fund, and then virtually ceased to be a party. For aught we know, she may have already settled the demand and got a release, although we have no means of ascertaining the fact, or of making it available on an inquiry before the Master. If, on the other hand, the debt still subsists, she, as representing the debtor, is the proper person against whom to proceed; and if, as has been intimated, no action could be successfully maintained against her, equity will not interfere to give a relief beyond the law, or to put the plaintiff in a worse situation than the party who is legally responsible. Ex parte Dewdney, 15 Ves. 479. At all events such relief could only be had upon a new bill filed against the administratrix, to which, perhaps, the present plaintiff might also be a defendant for the purpose of contribution: but it would be unjust to leave him to sustain single-handed a harassing contest in the Master's office, where he would

(*a*) See 2 Atk. 612. A foreigner who resides always beyond sea, is not bound by the statute of limitations. Strithorst v. Græme, 2 Bl. 723. S. C. 3 Wils. 143.

(*b*) Thomas v. Powell, 2 Cox, 394.

be exposed to great difficulties as to evidence, and would lose the opportunity of stopping the demand *in limine*, by putting his defence in the shape of a demurrer or a plea.

On the most unfavourable view, the plaintiff never could be charged beyond that proportion of the claim which his share bears to the whole residuary fund ; that is, four-ninths. Gillespie *v.* Alexander, 3 Russ. 130. That case may, probably, be cited in support of the petitioner ; but its circumstances were totally different. Before any apportionment had been made, the creditor obtained leave to prove his debt, so that the legatees had full notice : a report was made in favour of the claim ; and as there remained outstanding assets to be collected, the accounting parties must have continued before the court, and there was still a subsisting and effective suit. Here, however, the plaintiff's share was appropriated eight years before any claim was suggested. Of the justice of that claim there is no proof beyond the loose affidavit of the present consul speaking to his belief; and the administratrix, upon whom the burthen ought to fall, has passed her accounts, and received all she can ever be entitled to.

Mr Horne and Mr Collinson, for the petitioner.

The question is decided by Gillespie *v.* Alexander, which was much considered, and is in conformity with the opinion thrown out by lord Eldon, after hearing the argument on the present appeal. It is impossible to discover any substantial difference between the two cases. The plaintiff's residuary share, like that of a common legatee, was taken, subject to debts, and so long as it remains in the custody of the court that liability continues. It is vain to contend that the advertisements in the Gazette and the London newspapers, or a decree on further directions made in an amicable suit, can conclude the claim of a *bonâ fide* creditor ; Lashley *v.* Hogg, 11 Ves. 602 ; Angell *v.* Haddon(*a*) : far more of one who was out of the jurisdiction. The petitioner ought, therefore, to be at liberty to go in and prove for the full amount of his debt, leaving the question as to whether it shall be wholly borne by the fund in court, or rateably only, to be determined afterwards. If the latter is the proper mode, as the judgment in Gillespie *v.* Alexander seems to indicate, there is an end of all difficulty about contribution ; for the money, paid over to the infant's separate account, is bound in equity to bear its proportion of the debt, whatever may become of the share already received by the administratrix. Nor can it be accounted any hardship to the plaintiff, that a proceeding, of which he has had the benefit, should be also made an instrument for enabling him to discharge his just obligations. It is premature to argue the points that have been raised upon the statute of the laches. They will come to be discussed regularly in a later stage, either on the inquiry before the Master, or on exceptions to his report. Every defence which the plaintiff could have made at law, or upon a new suit, will be then open, and in a more summary and less expensive way. Of course, if the debt be barred by the statute or by laches, or if it be not established by satisfactory evidence, the Master will disallow the claim. All that we ask now is an opportunity of tendering our proof. It has never been supposed that the statute of limitations could run against a foreign prince, more especially against one, who, being an alien enemy till the year 1812, was unable till then to prosecute his claims in a British

(*a*) 1 Madd. 529. See also 1 S. & L. 242 ; and what lord Eldon says in 3 Russ. 136, and 19 Ves. 339.

court. The whole of the intestate's property was not administered in the suit, a considerable portion having been retained by the administratrix, in her own hands, on account of her share. Her answer shows that the fund was not clear; for it speaks of claims made by the Russian government as being then unsettled, and the affidavits prove repeated applications to her upon the subject.

The Solicitor-General, in reply.

The Lord Chancellor. From the report of what took place when this case came before lord Eldon, his lordship seems to have considered that he had disposed of one of the questions here discussed, namely, whether the fund in court should be liable, as the order of the Vice-Chancellor had made it, to the full amount of the claim brought forward by the emperor of Russia, or to a proportionate part only. I think his lordship's opinion upon that point corresponds with the principle of his subsequent decision in Gillespie *v.* Alexander, and I am certainly disposed to agree with him in that opinion. The question, however, stood over for consideration as to the other point, and it would rather seem that lord Eldon then intended that the creditor should be allowed to come in and prove, though it is not very distinctly stated in what way, or upon what terms, that was to be done; and the matter again stood over for arrangement and further discussion. Since that time the parties are placed in a new position, inasmuch as, in the interval, the infant plaintiff has come of age. It does not appear what effect lord Eldon thought that circumstance would have on the rights of the parties. I shall, therefore, take time to consider it.

March 13.—The Lord Chancellor. The intestate in this case died as far back as the year 1807, and the persons now claiming against his estate, on behalf of the emperor of Russia, are public officers, and he was himself a public officer of the Russian government; and they, therefore, must have known of his death immediately after it took place, and of the claims which that government had against him. In 1817 a final decree was pronounced, and under that decree the administratrix took out her share of the estate; and the remainder of the fund in court, amounting to four-ninths of the whole, was carried over to the account of the plaintiff, Mr W. Greig, who was then an infant. Under these circumstances, it would, in my opinion, be unreasonable and unjust, that the share now remaining in court should be charged with the whole debt; and not, as was the opinion repeatedly expressed by lord Eldon, and in which I fully agree, to the extent of four-ninths only. To that extent, therefore, I think it proper that the agents of the emperor of Russia should be at liberty to go before the Master to prove such debt as they may be able to prove, as a debt due from the intestate, subject, however, to such defence as the party might have availed himself of, in case a bill had been filed against him. Mr Greig, I think, should be at liberty to take out the whole of the fund, with the exception of a sum equal to four-ninths of the amount of the present claim.

The decree directed that the ambassador of the emperor of Russia should be at liberty, on behalf of the emperor, to go before the Master and prove such debt due from the intestate to his imperial majesty as he might be able; and that the personal representative of the intestate, upon

such proof, should have the benefit of any defence which he could have made, if his imperial majesty had filed a bill for the purpose of obtaining payment of the said debt out of the assets of the said intestate. And that so much of the stock standing in the name of the accountant-general upon the account of the plaintiff W. Greig, as would be equal to four-ninths of the debt claimed, should not be paid or transferred till the Master had made his report, &c.

Reg. Lib. 1829, A. fol. 1651.

Shewen *v.* Vanderhorst(*a*).

Russell and Mylne, 347.

Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time; and the executors refusing to interfere, the plaintiff, a residuary legatee, insisted on setting up the objection of the statute:

Held, that it was competent for the plaintiff, or any other party interested in the fund, to take advantage of the statute before the Master, notwithstanding the refusal of the executors.

Whether the Master is himself bound to take the objection. *Quære.*

Nov. 22, 26, 1831.

THIS was a suit instituted by a residuary legatee, for the purpose of having the real and personal estates of a testator administered, and the trusts of the will carried into execution. Under the usual decree, directing, among other things, an account to be taken of the debts, a creditor, of the name of Palmer, went in to prove a debt, against which it was admitted that the statutory period had run, before the testator's death. The executor did not object to the proof in the Master's office; but the objection that it was barred by the statute of limitations was taken and insisted upon by the plaintiff, and the Master accordingly disallowed the claim. The Master's opinion having been afterwards confirmed by the judgment of the Master of the Rolls, the creditor now appealed to the Lord Chancellor.

Mr Pepys and Mr Wakefield, for Mr Palmer.

The act of parliament, 21 Jac. 1. c. 16, which takes away the remedy from a creditor who suffers six years to elapse without enforcing his demand, but does not destroy the obligation, places the original debtor and his legal representative on precisely the same footing. The privilege thereby conferred is purely personal to them. According to their discretion they may, or they may not, think proper to avail themselves of the statute; but if they are willing to forego it, it is not competent for any other individual, least of all for a residuary legatee, who is a mere volunteer, to insist upon the objection for his own benefit, and to the prejudice of an honest creditor. It is a settled rule, and it has been so laid down by lord Hardwicke, that "no executor is compellable, either at law or in equity, to take advantage of the statute of limitations against a claim otherwise well founded."

(*a*) This case is inserted here on account of its connexion with some of the topics discussed in Greig *v.* Somerville.

[Shewen *v.* Vanderhorst.]

Norton *v.* Frecker, 1 Atk. 526. In Castleton *v.* Fanshaw, 1 Eq. Ab. 305(*a*), it was held by lord Somers, that where creditors, whose debts were barred by lapse of time, were seeking to recover them by action, this court would not, in favour of a residuary legatee, compel the executor to plead the statute at law. That case, so far as its circumstances can be collected from the report, appears to have been closely analogous to the present, and its authority has never been disputed(*b*). The power of defeating an obligation morally binding on the conscience, by relying on the statute of limitations, has always been regarded by the court with extreme suspicion and jealousy. The privilege has never hitherto been extended to any but the personal representatives of the debtor, and even as to them it has been confined within the narrowest limits; for if a suit had been brought for the recovery of this particular debt, and the executors had from any cause neglected to avail themselves of the objection, by way of demurrer or plea, or by expressly stating it in their answer, it is admitted that they could not afterwards have recourse to that species of defence. If the objection be not raised distinctly on the record, it is too late to urge it at the hearing. Upon principle, what difference should it make that here payment is sought not by a separate bill (which, if that is to be the rule in future, will encourage a multiplicity of suits, and load the estate with great additional expense), but under the common decree in an administration suit, directing an account of the debts? When creditors, taking the benefit of such a decree, carry their claims into the Master's office, the personal representative is there permitted to exercise the same privilege of setting up the statute in bar of their demands, as he might have done against an action or a bill: but if he sees fit to waive his right, neither the Master nor any other party is entitled to make the objection.

Suppose this had been a creditor's suit, and the usual decree had been pronounced, could any reasonable ground be assigned for the distinction which his honour's decision necessarily introduces, between the situation of the plaintiff on the record, and all the other creditors who may go in and prove? The language of lord Eldon, in Ex parte Dewdney, 15 Ves. 498, is quite consistent with the notion that the privilege is strictly confined to the executor: for when his lordship there says, that in a creditor's suit, the constant course in the Master's office is to take the objection against other creditors, he means no more than this, that though the executors have a discretion, as to pleading the statute against the creditor by whom the bill is filed, they do not, by waiving it, as against him, preclude themselves from raising the objection against other creditors going in before

(*a*) See also what sir S. Romilly says *arguendo*, 13 Ves. 469.

(*b*) From the report of the case in Pr. Ch. 99, which was not referred to, but where the circumstances are more fully and distinctly stated, Castleton *v.* Fanshaw appears to have been a suit by the residuary legatee to administer a testator's estate. The plaintiff there was desirous that the statute should be set up against certain creditors, who had gone before the Master to prove their debts; but the executors not choosing to take advantage of that defence, the Lord Chancellor refused to listen to the objection, coming from the residuary legatee, and directed the debts to be paid: and he rejected an application that the creditors should be ordered to bring actions to recover their demands at law, and that the plaintiff should have liberty to stand in the place of the executors, as the defendant in those actions, and to plead the statute of limitations.

the Master: but his lordship never could have intended, in opposition to the authorities referred to, to have disputed or limited the privilege of the personal representative.

The Solicitor-General and Mr Piggott, for the defendants, the executors, stated, that as the executors were convinced that the demand in question, though barred by lapse of time, had not been paid, and was therefore a just debt, they had only acted as they knew their testator would have done, and as they conceived they had a legal right to do, in declining to avail themselves of the dishonest defence which the statute might have afforded.

Sir Edward Sugden and Mr Barber, for the plaintiff.

This case shows the wisdom of the court in restricting the discretionary power of the personal representative within narrow bounds. That power would otherwise be liable to great abuse; for if (as for aught that appears may be the fact here) the executors be disposed to collude with creditors like Mr Palmer, the consequences might be highly injurious to those who have still valid and recoverable demands, as well as to all other parties who may happen to have an interest in the fund. The moment, therefore, that a decree is made in a creditor's suit (and the rule must be the same in a suit by legatees), the discretion of the executor ceases, and he becomes utterly powerless; no action is permitted to be brought against him; the court immediately steps into his place, and itself exercises his functions for the benefit of all parties concerned: it becomes competent for any party, without his sanction or concurrence, to take the objection in the Master's office; and even if no one should be there disposed to interfere, still it is the duty of the Master, acting in behalf of those who may not be present or able to protect themselves, to insist upon the bar which the statute has created against stale demands. The officer of the court knows no partialities or preferences, nor will he listen to those of the executor: he does not wait to be told, whether the executor is, or is not, willing that a debt should be paid; but he simply inquires whether it be a valid and subsisting claim; and unless he is satisfied that it is so, he disallows it. It appears from another report(*a*) of the case referred to in Equity Cases Abridged, that the creditors there had compromised their claims with the executors, on a representation that the assets were deficient; and when assets were afterwards recovered, the main question being whether this compromise should stand, the court declined to interfere. The whole seems to have been matter of arrangement. The case, besides, is stated so vaguely, that little reliance can be placed upon its accuracy, and it has never been recognized since. In Maltby *v.* Russell, 2 S. & S. 227, the present Master of the Rolls, although he felt himself bound by the authorities, expressed a strong opinion against the right of an executor to favour some creditors in preference to others, after a creditor's bill had been filed for an account, but before a decree had been obtained. His honour never imagined that *after* a decree such a right could be seriously asserted.

The principle on which the right to resort to this defence is upheld in courts of equity is clearly stated by sir T. Plumer, towards the close of his judgment in Burke *v.* Jones, 2 V. & B. 290, and it rests, not on favour to the executors, but on the presumed intention of the testator; as to which, after a decree, it is for the court and not for the personal representative to judge. Indeed, the effect of a decree for an account is to convert all the

(*a*) 2 Eq. Ab. 254, pl. 1. Ibid, 259, pl. 1.

parties into *quasi-actors*. Here a residuary legatee takes the objection; but it is clear from lord Eldon's language in ex parte Dewdney, that his lordship considered it to be the duty of the Master, without reference to the parties, to set up the bar of the statute just as the commissioners are in the habit of doing every day in bankruptcy, without consulting the wishes of the bankrupt or other of the creditors.

The Lord Chancellor (lord Brougham), said, he entertained little or no doubt: he was of opinion that the observations of lord Eldon, as well as the analogy of the rule in bankruptcy, bore strongly upon the subject under discussion; but as he had been pressed to look into the cases referred to, and the point was also in some measure new, he should take a few days to consider it.

Nov. 26.—The Lord Chancellor. The farther consideration I have given to the subject has not been affected by the authority of the case of Castleton *v.* Fanshaw, in 1 Equity Cases Abridged, which was so strongly relied upon by the counsel for the creditor. That case goes only to this extent, that where an executor is sued at law, a court of equity will not compel him to plead the statute, a proposition which, in fact, amounts to no more than this, that the court will not call upon him, in administering the estate here, to set up the statute as a bar to any demands that may be made against the assets. But the question here is, whether, when a decree has been pronounced, taking possession of the estate, and vesting it in the court for the purpose of distribution, a decree by which the accounts are directed to be taken, and the assets are to be administered in the Master's office, and after which the common law must be altogether silent; whether, under these circumstances, if the objection that the statute has barred the remedy be raised against a debt, and in whatsoever way or by whomsoever, being parties in the suit, be they creditors or executors, or even volunteers, the objection be raised,—it must not be considered fatal? And without at present saying how far the Master is himself entitled to set up the objection, I can see no reason, certainly, why it may not be competently taken by a creditor or a volunteer, as well as by the personal representative. The order of the Master of the Rolls must, therefore, be affirmed.

Powell *v.* Wood.

Russell and Mylne, 354.

MR PARKER, for the plaintiff, moved, on notice, that an issue which the Master of the Rolls had, in the year 1827, directed to be tried in Middlesex, and in which the defendant in equity was to be the plaintiff, should be taken *pro confesso*, on an affidavit of the facts,—that the plaintiff in the interval had repeatedly made default, and had declined going to trial, and also an affidavit of service of the notice of motion.

No counsel appeared to oppose the application.

[Powell *v.* Wood.]

The LORD CHANCELLOR, after consulting with the registrar (Mr Bedwell), granted the order *nisi*(*a*).

March 11, 1830.

In re Fitch.

Russell and Mylne, 354.

An abatement in the rent paid by the tenant of a lunatic's estate directed without a reference, under the circumstances, on the application of the committee.

March 11, 1830.

MR ROUPELL, on behalf of the committee of a lunatic's estate, applied for permission to make a reduction of 15 per cent on the rent, which, to the amount of 400*l.* a year, was paid by a tenant of the estate. The application was supported by a strong affidavit of the committee, in which he stated that in his judgment the abatement was reasonable and necessary; that similar abatements had been very generally made to the farmers in that part of the country; and that this particular tenant had, from the pressure of the times, got into arrear, but was highly respectable. Mr Roupell submitted, that as the evidence now before the court was exactly the same as would be tendered in the Master's office, and the whole sum to be abated was only 60*l.*, the order should be made at once, without the expense of a reference to the Master.

The LORD CHANCELLOR made the order without a reference(*b*).

In re Thompson.

Russell and Mylne, 355.

MR PARKER applied for an order on the petitioner, who was committee of the person and estate of a lunatic, to deposit the lunatic's will, which had come into his hands many years ago, in the custody of the Master, to whom the matter was referred, or with such other person as the court should think proper; on an affidavit of the facts that the will was in the same state in which the petitioner received it, &c. The same thing, it was stated, had been done in Creswell's lunacy. The next of kin were served, and consented.

(*a*) See on this point Wilson *v.* Ginger, 2 Dick. 521; Gardiner *v.* Rowe, 4 Madd. 236; Anon. ib. 255; 1 J. & W. 266; 2 Fowl. Ex P. 197.

(*b*) Where the object is to obtain the authority of the court for an abatement of the rent paid by tenants upon the estate of a lunatic, lord Brougham, C., following the rule laid down by lord Eldon (Ex parte Town., 1 T. & R. 1), uniformly requires that the petition shall be presented by the committee; and on several occasions his lordship has dismissed such applications, on the ground that they did not come from the committee, but the tenant.

[In re Thompson.]

The LORD CHANCELLOR thought it was the proper course, and made the order accordingly.

March 11, 1830.

In re Avery.

Russell and Mylne, 356.

A PETITION entitled "In the matter of M. A., a person of unsound mind, and in the matter of an act," &c. (56 Geo. 3. c. 60), was presented by the committee of a lunatic, stating that 6300*l.* of stock was standing in the name of the lunatic; that as no dividends had been claimed on that sum for twenty-seven years, the stock had been carried over to a separate account, under the provisions of the act of parliament, and that the bank, on being applied to, refused to make the transfer required by the committee, without the sanction of the court.

Mr Phillimore, who supported the application, asked that the transfer might now be directed without a reference, urging that the affidavits clearly established the identity of the lunatic with the person whose name appeared in the bank books; and Mr Wray, for the next of kin, consented.

The LORD CHANCELLOR at first entertained doubts; but afterwards, on referring to Ex parte Nicholl, 1 Turn. & Russ. 119, he made the order without a reference.

March 17, 1830.

Leake *v.* Nalder.

Russell and Mylne, 357.

AN order was made that the defendant should pay a sum of money by a certain day, or on default, should stand committed. The plaintiff having been unable to serve that order in time, the defendant keeping out of the way, obtained, as of course, a second order to enlarge the time allowed for the payment, and make service of it on the defendant's clerk in court good service: The second order was irregular: it ought to have been made on notice.

March 17, 1830.

Bradshaw *v.* Bradshaw.

Russell and Mylne, 358.

Where a witness is served with a subpœna to produce deeds on the execution of a commission, it is not necessary that there should be a written interrogatory as to the fact of his having them in his possession; and if he then takes upon himself to refuse production, he does so at the peril of costs in the event of his failing to satisfy the court of his right to withhold them.

March 20, 1830.

ON the execution of a commission for the examination of witnesses in the country, a solicitor of the name of Higgin was served with a subpœna duces tecum, and also with a summons from the commissioners, requiring him to appear before them on a stated day, and to produce a certain deed which it was necessary to prove in the cause, and which, there was good reason for believing, was in his custody. Higgins accordingly attended at the proper place and time, and answered all the written interrogatories; but on being verbally asked by the plaintiff's solicitor, whether he had the deed in question, he refused to give any answer, and declined to produce it; and it consequently became impossible to take the deposition of an attesting witness, who was in attendance for the purpose of proving that the deed had been duly executed.

On an application to the Vice-Chancellor, his honour was of opinion that Higgin had shown no sufficient ground to justify him in withholding the deed; and an order was made that he should attend before the commissioners, and produce it, and should pay to the plaintiff all the costs occasioned by his previous refusal.

Mr Spence and Mr S. Sharpe, moved to discharge that order. They stated that the objection of Mr Higgin rested upon two grounds: First, he claimed on behalf of a client an interest in the deed, in respect of which that client ought to have been made a party to the suit: Secondly, as the interrogatory put to him with respect to his having the deed in his possession was not in writing, he did not conceive that he was bound to answer it. The latter, though apparently an objection of form, was important, with reference to the rights of witnesses, who, if the Vice-Chancellor's order were affirmed, would, in a case of very frequent occurrence, be deprived of the privilege of demurring. According to the established practice, which was followed in Parkhurst *v.* Lowten(*a*), there ought to have been a written interrogatory as to the fact of possession, in order to give Mr Higgin an opportunity of explaining the reasons why he could not produce the instrument without a breach of duty to his client. And as the commissioners were not competent to decide upon that point, the only regular way in which the matter could be brought under the consideration of the court, was upon the formal demurrer of the witness, specifying the interrogatory objected to, and setting forth at large the grounds of the objection. A demand to produce deeds was in fact an interrogatory, for it necessarily involved an answer to the question, whether

(*a*) 3 Mad. 121; S. C. 2 Sw. 194, where all the cases are collected.

the witness had them in his custody or not. Bowman *v.* Rodwell, 1 Mad. 266; Shaw *v.* Morgan, 4 Mad. 54.

Mr Pepys, for the plaintiff, opposed the motion.

The Lord Chancellor said, that in his opinion no written interrogatory was necessary, Mr Higgin being bound, in virtue of the subpœna and the summons, to produce the instrument in question if he had it in his possession. It was true that a witness served with a subpœna duces tecum to produce deeds, might take upon himself to refuse such production, and he might be well or ill advised in so doing: but the refusal was at his own peril; and if, when the matter was brought before the court by an application against him, he failed in justifying the course he had pursued, he must abide the consequences. If, on the other hand, he succeeded in establishing such an interest in the deeds as entitled him to withhold them, the court would certainly protect his right. Here the Vice-Chancellor thought that the reasons of the witness were unsatisfactory; and his lordship saw no ground for differing in opinion with his honour.

Motion refused, with costs.

In re Buckle.

Russell and Mylne, 360.

EXTRA costs occasioned by a mistake of the Master allowed to a creditor proving his debt against a lunatic's estate.

March 20, 1830.

Wickens *v.* Townshend.

Russell and Mylne, 361.

A solicitor who receives rents in a cause without the authority of the court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff.

March 25, 1830.

THIS was a bill filed by incumbrancers, praying a sale of mortgaged estates for the purpose of satisfying their debts. In the progress of the suit, an order was obtained appointing a receiver; but in consequence of the sureties having delayed to perfect their recognizances, the appointment remained for some time formally incomplete. In the mean time, the plaintiff's solicitor (whether aware of the fact or not was uncertain) directed the receiver to meet him, on a certain day, at Rainham, in Norfolk, in the neighbourhood of which the estates lay, and where the tenants were to assemble for the payment of their rents; but having in the inter-

val, after the receiver's departure, ascertained the defect in his appointment, the solicitor left town himself, the same night, for Rainham; and on his arrival there, he interfered to prevent the tenants from paying the rents to the receiver, and succeeded in persuading them to pay the sums due from them into his own hands.

Before the recognizances were perfected, a petition was presented on behalf of the receiver, and the plaintiff, who was one of his sureties, praying that the sums so received might be paid over to the petitioner, as the receiver, or that such other order might be made on the subject as the court should think fit. At the time when the petition was heard, the appointment was formally complete.

The Solicitor-General and Mr Hayter, for the petitioners.

Mr Stuart, for the defendant lord Townshend.

Mr Horne and Mr Roupell, for the solicitor, objected that the petition was improper in point of form: it was presented in the name of a person styling himself receiver, though he was not then regularly appointed; and it prayed that the rents might be paid over to him; whereas the regular application was, to have them paid into court. Their client also, they contended, had a right to retain the amount, in virtue of some agreement with the plaintiff Wickens; or, if no such agreement could be made out, still he was entitled to set off, against the money he had received, certain costs which were due to him from Wickens.

The Lord Chancellor. If the court has these facts brought to its knowledge, will it refuse to correct the evil because the person praying the relief had not, at the time when he presented the petition, the character which entitles him to that relief? One of the petitioners is the plaintiff in the cause. It is true that the other petitioner was not clothed with the character of receiver at the time when the petition was presented; but the prayer is, that the rents may be directed to be paid to the receiver, or to some other proper person. When the petition came on to be heard, his character of receiver was complete; and the question now is, whether the court will think it proper to direct the money to be paid to him in that capacity. It appears that he went down by the morning coach to Rainham: in the evening of the same day the plaintiff's solicitor followed by the mail, and met the petitioner, and informed him he was not entitled to receive. The tenants were on the spot, and ready to pay their rents, and the solicitor being there to receive them, it was, I think, convenient for all parties, and perhaps, under the circumstances, it was not improper, that he should receive them; but it was his duty to do so only with a view to hand them over to the officer of the court appointed for the purpose, as soon as the latter had completed his recognizances. A person can have no right of lien over property which he acquires in an assumed character, or by tortious means.

Order made.

Yarnold *v.* Moorhouse.

Russell and Mylne, 364.

A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends by bankruptcy, insolvency or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the lords' act (1 Geo 4. c. 119), in the usual way; and some years afterwards the testator died: Held, that this insolvency operated as a forfeiture of the life-interest given to the nephew by the will.

March 24, 1830.

RALPH PENTON, by will dated the 3d of December 1814, bequeathed to his executors the sum of 5000*l.* five per cent navy annuities, for which, by a codicil dated the 6th of April 1822, and confirming the will in all other respects, the like sum in three per cent annuities was substituted, upon trust, to pay the dividends thereof to his nephew, George Penton, into his own hands only, for the term of his natural life; it being his express will and intention that he should receive the same for the sole purposes of the maintenance and support of himself and family, and that such interest and dividends, or any part thereof, should not be in any manner liable to, or be capable of being charged with the debts and engagements of the said George Penton, and without any power to him to charge, assign, anticipate, or encumber all or any part of such dividends and income before the same should become due and payable. And in case the said George Penton should in any manner charge, assign, encumber or anticipate the said dividends, or any part thereof, or if the same, or any part thereof, should, by operation of law, either by bankruptcy, insolvency, or any other ways or means whatsoever, be assigned or become payable to any person or persons whomsoever, or be or become in any manner applicable to or for any other purpose than for the prospective maintenance and support of the said George Penton and his family, then and in such case the life estate and interest of the said George Penton, in the said bank annuities, should cease and determine, and the said executors should stand possessed of the said bank annuities, upon certain trusts, for the benefit of the said George Penton's children, as therein mentioned.

The testator died on the 17th of August 1825.

The Master found that, on the 25th of March 1822, George Penton, the nephew of the testator, was discharged under the act for the relief of insolvent debtors, having previously executed a warrant of attorney to the provisional assignee of the court for the relief of insolvent debtors; and that, in Hilary term 1829, such assignee caused judgment to be entered up on the said warrant of attorney. The Master did not find that any execution had been issued on such judgment, or that the court for the relief of insolvent debtors had made any order permitting execution to be

[Yarnold *v.* Moorhouse.]

taken out upon such judgment, or put in force any power given by the said act against the property assigned by the said George Penton after his said discharge, nor had any claim been brought in before him by the provisional assignee, claiming any interest in the said legacy on behalf of the creditors of George Penton. And the Master did not find that George Penton had in any way charged, assigned, encumbered or anticipated the dividends upon the said legacy, save as the same might be considered as charged, assigned, or encumbered by the said warrant of attorney and judgment. And the Master did not find that the same, or any part thereof, had by operation of law, either by bankruptcy, insolvency, or otherwise, been assigned or become payable to any other person or persons whomsoever, or become applicable to or for any other purpose than for the prospective maintenance and support of the said George Penton and his family.

The Vice-Chancellor having decided that George Penton's insolvency operated as a forfeiture of his life interest in the legacy of 5000*l.* stock given him by the will, and that the dividends belonged to his infant children, an appeal was now brought from that decree.

Mr Treslove and Mr Teed, for the appellant.

When the testator executed the codicil of the 6th of April 1822, he knew, or must be presumed to have known, that his nephew had taken the benefit of the insolvent debtors' act in the preceding March: what his will, which for this purpose speaks either at the time of his death, or at the date of his codicil, contemplated, could only have been some future event, working a prospective forfeiture. The testator must have meant a bounty, and the words he uses, "shall be liable," import a contingency to happen after his death. No such contingency has yet occurred. Upon any other construction the legacy never vested in the father at all; and if so, it could not go over to the children. The present insolvent act (1 Geo. 4. c. 119), was passed long subsequent to the date of the will, which, of course, could have no reference to the provisions of that statute. The operation of the assignment made in pursuance of the act (differing materially in that respect from the policy of the law in bankruptcy) is confined exclusively to property which had, at the time of his petition, vested in the insolvent; Hepper *v.* Marshall, 2 Bing. 372; and the right to these dividends consequently could not be in any manner affected by it. No execution could seize this property in the hands of the trustees, so that it cannot be considered as applicable to debts within the meaning of the will. The forfeiture can only arise, if at all, when the creditors endeavour, for the purpose of reaching the legacy, to put in motion the machinery of the act. A variety of processes must be gone through, according to the particular mode prescribed by the 30th section, which still leaves a discretion in the court to withhold or direct the payment, as it may see fit(*a*).

(*a*) By the 1 Geo. 4. c. 119, s. 30, it is enacted, "that in case any person or persons, body politic or corporate, shall, after the discharge of any such prisoner out of custody, as aforesaid, become possessed of, or have under his or their power or control, any stock in the public funds of this country, or any legacy, money due or growing due, bills of exchange, promissory notes, bank notes, securities for money, goods and chattels, or any other property whatsoever belonging to such prisoner, or held in trust for him, or for his use and benefit, or to which such prisoner shall be in any way entitled; or in case any such person or persons, body politic or corporate, shall be in any manner indebted to such prisoner, it shall and may be lawful for the said court, upon the application of any assignee or creditor of such prisoner, to cause notice to be given to

Very probably the court might refuse to make an order on the subject, for the order would immediately defeat itself; besides, there is no evidence that there are debts remaining unpaid. At any rate the creditors have not attempted to avail themselves of their powers, nor is it likely that they will try to seize upon a fund which must instantly slip from their grasp. If they did, however, the order of the insolvent debtors' court would not touch the by-gone dividends accrued due before notice. To give such an effect as the respondents contend for to the language of this will, would be to permit the same words to bestow and take away an estate in the same breath.

Upon the general question, whether the clause in the will was sufficiently strong to render the act of insolvency a forfeiture of the life interest, the following cases were cited: Dommett *v.* Bedford, 6 T. R. 684, and 3 Ves. 149; Shee *v.* Hale, 13 Ves. 404; Brandon *v.* Robinson, 18 Ves. 429; Wilson *v.* Greenwood, 1 Sw. 471; Wilkinson *v.* Wilkinson, 3 Sw. 515; Ex parte Taaffe, 1 G. & J. 110; Cooper *v.* Wyatt, 5 Mad. 482(*a*).

The Lord Chancellor thought it impossible to get over the words of the will, which he remarked were very general and strong, carrying over the estate to the respondents, in the event of the bequest to George Penton "being or becoming in any manner applicable," that is, subject to be applied to the payment of his debts. He thought it could not be denied that the dividends were so applicable, if they were subject, at the discretion of the creditors, to be charged with the payment of their debts; and he dismissed the appeal without costs.

Mr Horne and Mr Whitmarsh, who appeared for the respondents, were not called upon to support the decree.

Ex parte Clayton.

Russell and Mylne, 369.

If an act of parliament, by general words, purports to confer a power upon several donees, one of whom possesses the same power more amply at common law as incident to his estate, the statute shall not be intended to apply to him, so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorized, will be referred to his common-law right.

April 1, 1830.

IN the year 1792, L. P. Starkie conveyed certain real estates in strict settlement, to himself for life, remainder to trustees to preserve, &c., re-

such person or persons, body politic or corporate, directing him or them to hold and retain the said property till the said court shall make such further order concerning the same; and thereupon it shall be lawful for the said court further to order such person or persons, body politic or corporate, to deliver over such property, and to pay such debts as aforesaid, or any part thereof, to the receiver of the said court, or to the assignee or assignees of such prisoner for the general benefit of his creditors entitled to claim under such judgment entered up by order of the said court as aforesaid."

(*a*) See also Lear *v.* Leggett, 2 Sim. 479, where most of the other cases are referred to, and which was affirmed by lord Lyndhurst, C., on appeal: post.

mainder to his only son, L. G. Starkie, for life, remainder to trustees, &c., remainder to his first and other sons in tail male, remainder to the second and every other son of L. P. Starkie (the settlor), successively in tail male, with divers remainders over. In the year 1798, a private act of parliament was obtained, which reciting the settlement of 1792, and the birth, subsequently, of L. G. P. Starkie and of L. G. N. Starkie, two younger sons of the settlor, and that it would be for the benefit of the estates and of the persons in remainder that the timber growing on the said estates should be cut, empowered the trustees therein named, and the survivor of them, with the consent of the person for the time being in possession or entitled to the rents and profits of the settled estates, under the limitations or trusts therein contained, such person having attained the age of twenty-one, or otherwise, with the consent of his guardians, to enter upon the lands, and cut the timber fit and proper to be cut; and the money produced by the sale of such timber was thereby directed to be laid out in the purchase of other lands, to be settled to the same uses.

The settlor, L. P. Starkie, died in 1807, and his eldest son, L. G. Starkie, who also had only a life interest in the settled property, died in 1822, without issue. During their lives considerable quantities of timber were felled by the trustees, and the produce invested in other lands, which were settled as the act directed. The second son of the settlor, L. G. P. Starkie, in whom, on the death of his brother, the estate then vested, (he being the first tenant in tail under the settlement), was a lunatic, and during his lunacy timber was cut and sold by the authority of the committee of his estate, who was also a trustee under the act of parliament, and the produce, to the amount of 11,000*l.*, was paid into court. The next of kin of the lunatic now applied that this sum might be paid over to the lunatic's general personal account, while his heir-at-law, on the other hand, contended that it had been cut under the powers conferred by the act, and should therefore be declared to be real, or be invested in the purchase of real estate.

Mr Spence, for the committee.
Mr Sidebottom, for the next of kin.
Mr Palk, for the heir at law.

The Lord Chancellor held that the act was intended to apply only to the tenants for life under the settlement. It gave the trustees a power to cut the timber to a limited extent and in a limited way; and then, with a view to the interest of those in remainder, it provided that the produce should be invested in land and settled to the same uses; but it said nothing as to the right of the tenants in tail. It must, he thought, be confined, as was clearly the intention, to the estates of the tenants for life. To construe the act otherwise would be to carry it beyond the purpose obviously in view; for it never could be meant, there being no negative, but merely permissive words, to abridge the common-law right of the tenant in tail. The produce of the timber, therefore, was to be taken as personal estate.

In re Ashley.

Russell and Mylne, 371.

A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest, amounting to 1600*l.* a year, towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account; and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces: Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her.

April 3, 1830.

A COMMISSION of lunacy, executed in January 1829, found that Catherine Ashley was then of unsound mind, and incapable of managing her affairs. A reference was subsequently made, directing the Master to inquire and state (amongst other things) of what the fortune of the lunatic consisted, and what sum would be proper to be allowed for her support and maintenance, regard being had to her circumstances and estate, and out of what fund such allowance should be paid.

By his report, bearing date the 9th of February 1830, the Master stated that the lunatic was entitled, under the will of her father, to certain real estates for life and in tail, and also, as coparcener along with her two sisters of the half blood (who were her sole next of kin), to her undivided third part of certain other real property in fee. And he found that the total annual value of those several estates, together with the interest of certain legacies of stock, &c. bequeathed to her by the same will, amounted to the sum of 2280*l.* He also found that from the year 1798, when her father died, down till the period of her mother's death in the month of September 1828, she had constantly resided in the family mansion with her mother Mrs Ashley, who had continued during the whole of that time to have the charge of her daughter and to maintain her. He further found that Mrs Ashley, by will dated the 14th of January 1828, after giving divers specific bequests to persons therein named, and among the rest, legacies of 500*l.* each to her two step-daughters, devised a freehold messuage, with fifty-seven acres of land at Coton, and all other her real estate, unto her two nieces, Elizabeth Scott and Elinor Wilson, as tenants in common in fee, they or one of them permitting the testatrix's daughter Catherine to reside with them, or one of them, and taking care of her, and managing her concerns so long as her daughter and either of her said nieces should live: all the rest and residue of her estate and effects she gave and bequeathed to certain trustees (whom she also nominated her executors), in the following terms:—"upon trust to receive the interest, income and dividends which shall grow due thereon during the life of my said daughter Catherine, and to apply the same in and towards the maintenance and support and clothing of my said daughter, or otherwise, for her comfort and advantage, in such way as they my trustees shall think proper, and without being liable to account to any person or persons whatsoever for the same or any part thereof; and from and after the decease of my said daughter, upon trust to pay the principal of the said trust

[In re Ashley.]

moneys, and also all interest, income and dividends which shall become due during the life of my said daughter, and not be actually applied as aforesaid"—to and for the benefit of the testatrix's three nieces, in manner therein mentioned. The Master found, that the residue of Mrs Ashley's estate amounted to about 1600*l.* a year; that an annual sum of 1200*l.* was proper to be allowed for the maintenance of the lunatic; and that the whole of that allowance ought to be paid out of the income to arise from the property to which she was entitled under her mother's will. The report also stated the affidavit of the medical gentleman who had attended the lunatic for the last five-and-twenty years, from which it appeared that she had continued in the same state of mental imbecility from a very tender age, and that no reasonable hope could be entertained of her recovery.

The next of kin of the lunatic presented a petition praying a confirmation of the Master's report, and the trustees under Mrs Ashley's will presented a counter-petition, praying that the lunatic's allowance might be charged either entirely, or at least rateably, on the income of the property which she derived from her father.

The Solicitor-General and Mr Whitmarsh, for the trustees.

It is unreasonable that the whole of the allowance should be charged on the property derived from the mother. There was clearly no intention on her part to exonerate the paternal estates from a share of the burthen; and as the lunatic, in the event of her recovery, would be equally entitled to enjoy both, the charge ought in fairness to be imposed proportionally on the two funds, instead of falling wholly upon one. When Mrs Ashley gave to her nieces (who are no relations of her step-daughters) whatever might not be actually applied to the daughter's use, she certainly thought she was conferring a valuable benefit upon them, and yet, according to the principle adopted by the Master, they will receive but a very small surplus; and had the allowance been only a little larger, it would have swallowed up the whole, and they would have taken nothing. The effect of that construction is to enrich the lunatic's next of kin, whom the testatrix had no wish to favour, at the expense of the legatees over. The language of the will shows an intention directly the reverse; for, upon the words as they stand, if the daughter had been sane, she could not have called for the whole of the fund, but only for so much as in the exercise of a reasonable discretion, and looking to her circumstances and situation in other respects, the trustees, or the court acting in their place, should think fit. The natural inference is, that the legacy given by the testatrix towards the support of her lunatic daughter, was only to be resorted to as an auxiliary fund, should the income from the paternal estate prove deficient for that purpose: a view which is confirmed by observing that the trustees are invested with an unlimited discretion; they are not to be accountable to any person whatsoever; and they will therefore do no more than what is strictly equitable, if they leave the whole or a proportional part of the burthen to be borne by the other fund. Upon the true construction of the will, besides, the surplus dividends not expended in the maintenance of the daughter, are not to be paid over annually to the three nieces, but are to accumulate like the income of the paternal property, till Miss Ashley's decease, when they will of course be distributable according to the ulterior trusts. In that view, therefore, even in the event of that lady's recovery, she can sustain no possible injury; for the total amount of the

savings will be the same from whichsoever source they are derived; and as between the persons who may be interested in her property after her death, there can be no preferable equity.

Mr Pepys and Mr Crombie, for the next of kin, contended, that the sole point to be considered was what would be most for the benefit of the lunatic, looking to the possibility of her ultimate recovery. That was the principle on which the Vice-Chancellor decided in Foljambe *v.* Willoughby, 2 S. & St. 165; Rawlins *v.* Goldfrap, 5 Ves. 440, a case which had a close application to the present. The arrangement proposed by the Master, by which the allowance was to be entirely paid out of the legacy taken by the lunatic under her mother's will, was the most advantageous that could be made; since whatever part of that legacy was not applied to her maintenance, being given over in that event to others, it would be so much lost to her. By charging the whole allowance on the maternal estate, the income arising from the paternal property remained untouched, and a fund might thus be accumulated out of the savings, which, if the lunatic recovered, would form a large addition to her fortune. It was true that if she did not recover (a possibility which the court never contemplated), this arrangement would prove beneficial to the next of kin and detrimental to the legatees; but that was a circumstance not to be attended to; for in questions of this kind the court would not look to collateral and contingent interests, whether they were those of expectant heirs or next of kin, or legatees over, who were all left to take their chance alike. If, however, any favour were to be shown, it ought rather to be shown towards those who were nearly related to the lunatic, than to strangers. As to the supposition that the savings of the maternal estate might accumulate so as to form an available fund in case the lunatic should recover; these would not, like the savings of the other fund, be her own to deal with as she pleased; they could only be applied towards her support and clothing, and would not be disposable by her will. The trustees could have no right under the words of the will to withhold any part of the fund from the daughter, whether lunatic or sane, provided it could be properly applied for her benefit; nor would the words relied upon exempt them from accounting(*a*). The bequest being "towards" her daughter's maintenance, was a proof that the testatrix thought it might not be adequate, and that, instead of being auxiliary, it was intended to be the primary fund.

The Solicitor-General, in reply.

The Lord Chancellor. I think the testatrix intended that this fund should be applied, in the first instance, for the maintenance, support and clothing of her daughter;—it might turn out eventually that it was not a sufficient provision, which would explain the use of the word "towards;"—and if there was any surplus, she gave it to the legatees over. Under these circumstances, it being for the interest of the lunatic, and not contrary to the intention of the will, I am of opinion that the charge should be wholly borne by the maternal estate.

(*a*) Upon this point see Hillier v. Hillier, 2 Freem. 110; Gibbons *v.* Dawley, 2 Chan. Ca. 198; Hamley *v.* Gilbert, Jac. 345, and Thurston *v.* Essington, ib. 361, n.

Watkins *v.* Lewis.

Russell and Mylne, 377.

Where the husband purchases an estate, but the whole consideration is paid by the sister of the wife, upon condition that the estate be settled to the use of the husband and wife in tail, there the case, though within the letter of the statute of the 11 Hen. 7. c. 20, is not within the equity of the statute: and the alienation of the wife, after the death of the husband, is valid.

Rolls.—Feb. 24, 25, March 9, 1830.

THE question in the cause was, whether an estate tail, which had been vested in Philadelphia Watkins, by a settlement executed by her husband after marriage, was, within the meaning of the 11 Hen. 7. c. 20, and 32 Hen. 8. c. 36, an estate tail in lands "of the inheritance or purchase of the husband," so as not to be barred by a fine, which she levied after her husband's death.

By articles of agreement under seal, dated the 29th of March 1754, between Elizabeth Hughes and Lætitia Hughes of the one part, and William Watkins of the other part, Elizabeth Hughes and Lætitia Hughes, in consideration of the sum of 2480*l.* 10*s.*, covenanted and agreed with Watkins, his heirs and assigns, that they, Elizabeth Hughes and Lætitia Hughes, and the heirs of Lætitia, would, at the costs of William Watkins, on or before the 24th day of June then next, well and sufficiently convey and assure unto William Watkins, his heirs and assigns, or to such other person and persons, and to such other uses, as William Watkins, his heirs and assigns should direct and appoint, certain lands, tenements and hereditaments in the county of Monmouth, called Gelly Vaur, Gelly Vach, the Pant Farm, and the Packhorse, together with some other premises situate in the same parish: and further, that they, Elizabeth Hughes and Lætitia Hughes would, before the execution of such conveyance, pay unto Elizabeth Lucas or her assigns, the mortgage then due on the said premises, and procure her to join in conveying the lands to Watkins. On the other hand, William Watkins, for himself, his heirs and assigns, promised to pay unto Elizabeth Hughes and Lætitia Hughes the sum of 2480*l.* 10*s.* at or immediately before the execution of the conveyance.

By indentures of lease and release, dated the 28th and 29th of January 1755, made between Elizabeth Hughes and Lætitia Hughes of the one part, and William Watkins of the other part,—after reciting that Watkins had contracted for the absolute purchase of the before-mentioned premises, at the price of 2480*l.* 10*s.*; that it had been agreed between the parties, that he should receive the rents from the 24th of the preceding June, and should from that day keep down the interest on Lucas's mortgage: that he had accordingly been in possession from the 24th of June; that Elizabeth Hughes and Lætitia Hughes had paid the interest on the mortgage down to that day, but that the principal sum of 1500*l.* still remained due, which Watkins was to pay with part of the purchase-money, and that the residue, being 980*l.* 10*s.*, was to be paid to the vendors; they, Elizabeth Hughes and Lætitia Hughes, in consideration of the sum of 980*l.* 10*s.*, conveyed the property to Watkins, his heirs and assigns;

and they covenanted that they were seised of the premises in fee-simple, free from incumbrances, except the mortgage for 1500*l.*

A receipt for 980*l.* 10*s.* was indorsed on the deed of release.

By an indenture dated the 25th of April 1755, between William Watkins and Philadelphia his wife of the first part, and Ann Constable, described as sister-in-law of Philadelphia Watkins, of the second part, and Thomas Symonds of the third part,—after reciting that, by the deeds of the 28th and 29th of the preceding January, the premises therein comprised had been conveyed to Watkins and his heirs, subject to the mortgage of 1500*l.*, and that such purchase was agreed for and made by Watkins, with the approbation of the said Ann Constable, who gave and advanced him the said 980*l.* 10*s.* upon condition that such estate and premises should be settled and conveyed to the uses thereafter mentioned, —Watkins conveyed the property to Symonds and his heirs, to the intent that Ann Constable should, subject to the mortgage for 1500*l.*, receive thereout a rent charge of 30*l.* per annum for her life; and, as to the fee and inheritance, subject to the mortgage and rent charge, to the use of Watkins and Philadelphia his wife, for their lives and the life of the survivor, without impeachment of waste for the life of William Watkins; with remainder to the use of the heirs of the body of Philadelphia by Watkins; with remainder to the use of the right heirs of Watkins; and he further covenanted that he had done no act to incumber the premises.

In 1758, 1600*l.* being due on the mortgage, Ann Constable paid it off; and by indentures of lease and release, dated the 24th and 25th of June 1758, the mortgagees conveyed the premises to her and her heirs, as a security for that sum. Watkins and his wife were parties to the release; and he covenanted for himself and for her to pay the mortgage-money and interest.

By deeds of lease and release, dated the 6th and 7th of May 1760, Watkins, in consideration of the arrears of the annuity of 30*l.* and of the interest on the mortgage then due to Ann Constable, and of her agreeing to pay sums to the amount of 900*l.*, for which she was then his surety, conveyed the lands and hereditaments to her and her heirs, subject to the estate and interest of Philadelphia, and the heirs of her body.

William Watkins died in the lifetime of his wife, leaving several children of the marriage him surviving. Edward, the eldest son, died in his mother's lifetime, and without issue. John, the second son, also died in the lifetime of his mother, but leaving two daughters, the present plaintiffs, who, upon the death of Philadelphia, which happened in 1823, were the heirs of her body.

After the death of William Watkins, Philadelphia Watkins, with the concurrence of the devisees and executors of Ann Constable, who had died previously, sold various parts of the property, and conveyed them to the purchasers, who entered into possession of the rents and profits. A fine had been levied in the 18th of Geo. 3. by Edward Watkins, the eldest son, by means of which it was supposed that a good title had been made; but as Philadelphia was not a party to the fine, and Edward, who levied it, was only heir in tail expectant on the death of his mother, and had not then, and did not live to acquire, any estate or interest in the premises, that fine proved inoperative. To remedy the defect, Philadelphia, in the 3d of Geo. 4. levied a fine for the purpose of barring her estate tail, and of effectually vesting the lands and hereditaments in the several persons to whom they had been conveyed.

[Watkins *v.* Lewis.]

The bill was filed by the daughters of John Watkins, claiming to be entitled as the heirs of the body of Philadelphia, against the several persons, who, under the conveyances from Philadelphia, had acquired interests in the lands and tenements comprised in the deeds of January 1755. It charged that the whole of the interest of the mortgage debt, and a considerable part of the principal, had been paid and satisfied by the receipt of the rents and profits; that the estates were derived from William Watkins the husband; and that the fine levied by Philadelphia was wholly inoperative to bar her estate tail, inasmuch as the plaintiffs, who were at that time the heirs in tail expectant on her death, were not parties to it, and were not consenting to it.

The defendants(*a*), by their answers, stated, that the purchase was made by William Watkins, with the approbation and on the behalf of Ann Constable, who was the daughter of the father of Philadelphia Watkins by another mother; that Ann constable advanced to William Watkins the purchase-money, upon condition that the lands should be conveyed to the uses declared by the indentures of the 24th and 25th of April 1755; and that in pursuance of that condition the lands were conveyed to those uses. They submitted, therefore, that the lands were derived from Ann Constable, and not from William Watkins, and that, consequently, the estate limited to the wife was not a settlement *ex provisione viri*, within the meaning of the 11 Hen. 7. c. 20.

Mr Bickersteth, Mr Preston and Mr Jacob, for the plaintiffs.

The 11 Hen. 7. c. 20, enacts, "That, if any woman which hath been, or hereafter shall have any estate in dower, or for term of life, or in tail, jointly with her husband, or only to herself, or to her use, in any manors, lands, tenements, or other hereditaments *of the inheritance or purchase of her husband*, or given to the said husband and wife in tail, or for term of life, by any of the ancestors of the said husband, or by any other person seised to the use of the said husband or of his ancestors, and have or shall hereafter, being sole, or with any other after-taken husband, discontinued or discontinue, alienced, released, or confirmed, aliene, release, or confirm, with warranty, &c., all such recoveries, discontinuances, alienations, releases, confirmations, and warranties so had and made, and from henceforth to be had and made, be utterly void and of none effect." And it is afterwards provided, that the act "extend not to any such recovery or discontinuance to be had where the heirs next inheritable to the said woman, or he or they, that next after the death of the same woman should have estate of inheritance in the same manors, lands or tenements, be assenting or agreeable to the said recoveries, where the same assent and agreement is of record or enrolled." Our propositions are, that the lands, of which Philadelphia Watkins levied the fine, were lands of the purchase of her husband: that the heirs next inheritable to her did not assent to that fine; and, therefore, that it was "utterly void and of none effect."

By the articles of March 1754, William Watkins covenanted for the absolute purchase of the lands; and the vendors covenanted to pay off the mortgage to which the lands were subject. The conveyance in January 1755, recited the agreement to purchase the fee-simple at the price of 2480*l.* 10*s.*, and carried the contract into effect; but as the vendors had

(*a*) The argument and judgment on a plea put in by some of the defendants, and which was decided on a point of form, are reported in 2 Sim. & Stu. 590.

not paid off the mortgage, the purchaser retained the amount of the debt, and took upon himself the responsibility of discharging the incumbrance. He was the purchaser of the entire fee-simple: part of the price he paid; the remainder of the purchase-money, namely, the mortgage debt, he became bound to pay. Thus, in April 1755, the lands were "of the purchase of the husband;" and the settlement then made, which gave the wife an estate tail in them, was a settlement of lands of the purchase of the husband. At the time of the execution of the settlement, the estate was in him; and it was from him that the settlement transferred it. If he had paid off the mortgage, could a doubt have been raised as to the question now agitated? and what difference is there, for the present purpose, between paying and becoming bound to pay?

It is true that 980*l.*, part of the purchase-money, was advanced by Ann Constable, a relation of the wife; but that did not make the contract hers, or entitle her to claim the estate. In Symson *v.* Turner, 1 Eq. Cas. Ab. 220; Vin. Ab. xiv. 555, pl. 25(*a*), the wife joined with the husband in barring an estate tail, which she had in lands of the yearly value of 400*l.*, and a new settlement was made, under which she took an estate tail in a part of the lands of the value of only 150*l.* a year: thus she was, by parting with her former estate tail, a purchaser of the latter estate tail; she had given up the whole in order to have a part re-settled; yet the estate limited to her under the second settlement was held to be *ex provisione viri*, and to be within the statute. In Kinaston *v.* Loyd, Palmer, 217, Vin. Ab. xiv. 554, pl. 22, the husband and wife sold the wife's lands, and laid out the money in the purchase of other lands, which were conveyed to the husband and wife; and though the whole of the purchase-money arose from the wife's property, it was held that the purchased lands were within the statute. In Stockbridge's case, Cro. El. 24, Vin. Ab. xiv. 549, in margin, the husband, for money paid by him, procured the freehold of copyholds, of which he and his wife were seised in fee, to be conveyed to him and his wife, and the heirs of their bodies; the wife afterwards suffered a recovery of the lands; and this recovery was held to be void against the heir. In Piggot *v.* Palmer, Moore, 250, Vin Ab. xiv. 551, pl. 5, lands purchased for 160*l.*, of which 140*l.* was paid by the wife's father, were conveyed to the husband and wife, and the heirs male of their bodies; and her estate was held to be within the statute. The same construction was adopted in Kirkman and Thompson, Cro. Jac. 474, Vin. Ab. xiv 554, pl. 21, where, in consideration of 200*l.* paid by the wife's father and of the marriage, the father of the husband conveyed lands to the use of the husband and wife and the heirs of the wife: yet there part of the value of the lands must be considered as having moved from the wife's family. Villars *v.* Beamont, Dyer, 146, Vin. Ab. xiv. 550, pl. 3.

If the lands, of which Philadelphia Watkins levied a fine, were, within the meaning of the statute, lands of the purchase of her husband, the only other question is, whether the heirs next inheritable to her assented to the fine? The plaintiffs were such heirs in expectancy when she levied the fine, and such heirs, *de facto*, at the time of her death: and it is not alleged that they ever assented. The ineffectual fine levied by Edward Watkins in the 18th of Geo. 3. when he was next heir, could not give validity to the fine which his mother levied more than forty years afterwards. Sey-

(*a*) The cases on this point are collected in Viner's Ab. vol. xiv., under the title "Jointress and Jointure."

mour's case, 10 Rep. 95. They were entirely distinct and independent proceedings, and could not be connected with each other so as to form part of one and the same transaction: a circumstance which distinguishes this case from Doe *v.* Whitehead, 2 Burr. 704; Selwyn *v.* Selwyn, 2 Burr. 1131. The assent, which the statute requires, must be an assent to the very recovery or discontinuance by which the lands are aliened, and by the person who is at the time heir. No assent, which would satisfy the requisition of the statute, could be given by Edward Watkins in 1778, to a fine which was not levied till 1822, long after his death, and when other persons were the heirs next inheritable. Mackwilliam's case, Hob. 332; Herring *v.* Brown, 1 Vent. 368, 2 Shower, 185.

Mr Tinney and Mr Wrottesley, Mr Treslove and Mr Duckworth, Mr Pemberton and Mr Turner, for the several defendants.

In Eyston *v.* Studd, Plowden, 459, Vin. Ab. xiv. 551, pl. 4, a husband and wife, seised in right of the wife, levied a fine to a third person, who rendered the land back to the husband and wife and the heirs of their bodies; a fine levied by the wife after the death of her husband was held not to be within the operation of the statute, although the lands were, within the words of the act, of the purchase of the husband by the first fine: Plowden, 464, "the intent of statutes being more to be regarded and pursued than the precise letter of them; for oftentimes things which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the act; and the best way to construe an act of parliament is according to the intent rather than according to the words. And the intent of the statute of 11 Hen. 7. was to restrain women who had jointures which proceeded originally from their husbands, or from the ancestors of their husbands, from disinheriting or doing other injury to the heirs of their husbands. Wherefore a man ought not to rest upon the letter of an act." Referring to the same case, lord Coke observes, First Institute, 366, a, "this is directly within the letter of the statute, and yet it is out of the meaning; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning." So here, the lands in question were the purchase of the husband in letter only, and not in meaning: he purchased nothing but the equity of redemption: he settled nothing but the equity of redemption; and every shilling that was paid for the equity of redemption came from the wife's sister of the half-blood. There never was any estate in him, which he was at liberty either to settle or not. It is evident from the recitals of the deeds of April 1755, that he was, from the first, a trustee for the purposes of the proposed settlement, of the only estate which he at any time had in the lands; and Ann Constable, as soon as the estate was conveyed to him, might have filed a bill to compel him to execute a settlement pursuant to the terms of the agreement, on the faith of which she had advanced the purchase-money. How can lands be considered to have been substantially the purchase of the husband, or to have proceeded from him, when the money with which they were bought, was furnished by the wife's relation, and furnished on an express agreement that the lands should not remain the property of the husband, but should be conveyed upon certain trusts for the benefit of the wife and the heirs of her body?

The statute does not apply, if the settlement be made by a stranger, Ward *v.* Walthew, Cro. Jac. 153, Vin. Ab. xiv. 554, in margin; much less, if the property be derived, as is the case here, from the wife or her

relations: nor does it make any difference that the husband pays a sum of money to the relations of the wife from whom the settlement proceeds. Copland *v.* Piatt, Jo. 254, Cro. Car. 244, Vin. Ab. xiv. 551, pl. 6. Here there is still less question, for no part of the purchase-money was advanced by the husband.

It has been argued that part of the consideration for the conveyance is to be considered as having moved from William Watkins; because, as between him and the vendors, he became liable to pay the mortgage. But the settlement extended only to the equity of redemption, and not to the estate discharged of the mortgage. If he had paid off the mortgage, the security would have been transferred to him, and he would have held it for his own benefit. He had an indemnity on the estate itself for all that he might pay in satisfaction of the mortgage: whatever he might so pay would be a consideration for which he would acquire an interest paramount to the settlement of April 1755; and, consequently, the making of such payments, and still more the liability to make them, could not be any part of the consideration for that interest which was comprised in the settlement.

The cases cited on behalf of the plaintiffs do not bear out the proposition for which they contend. In Symson *v.* Turner, the estate which the wife parted with, was acquired under a settlement made by the husband, and was *ex provisione viri:* all that the second settlement did was to substitute an estate tail in lands of 150*l.* a year for an estate tail in lands of greater value: the wife relinquished a settlement of lands which were of the purchase or inheritance of her husband for a settlement of part of the same lands: the first settlement being within the statute, the second also was necessarily within it. Kinaston *v.* Loyd proceeded on the principle that the money arising from the sale of the wife's lands vested absolutely in the husband: so that the estate purchased with it, was to be considered as paid for by him alone. The decision in Stockbridge's case rested on the ground, that the copyhold was completely extinguished by the enfranchisement, and that the only estate which the heir claimed was that freehold which the husband had purchased and paid for. In Piggot *v.* Palmer the transaction took place before marriage; the father of the wife paid the 140*l.* in consideration of the marriage and of the settlement: and the husband was by the marriage the purchaser of the wife's portion. The same observations apply to Kirkman *v.* Thompson, with this difference only, that there the money was paid, not to the husband, but to the husband's father. In cases of that description the money which proceeds from the wife, or her relations, cannot be considered as part of the price of the estate which is brought into settlement: it is paid in consideration of the marriage.

Mr Bickersteth, in reply, cited Hawkins *v.* Kemp, 3 East, 410, in support of the position that the fine levied by Edward Watkins could not be deemed an assent to the fine subsequently levied by his mother.

March 9.—The Master of the Rolls. In this case, a woman, seised in tail of certain lands under a settlement to which the husband was a party, alienates those lands after the death of her husband: and the material question in the cause is, whether these lands are within the statute of the 11 Hen. 7. c. 20, *ex provisione viri?* Being of opinion that these lands are not within the intent of the statute, it is not necessary for me to state more of the facts of this case than are necessary to explain the reasons of my judgment.

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By deeds of lease and release of the 28th and 29th of January 1755, between Elizabeth Hughes and Lætitia Hughes of the one part, and William Watkins of the other part,—after reciting that William Watkins had agreed to purchase the lands in question for a sum of 2480*l.* 10*s.* and had entered upon the possession on the 24th of June then last past, and was from that day to pay interest on a mortgage of 1500*l.* stated to be charged on the said lands, and was to pay the principal of the mortgage out of the said purchase-money of 2480*l.* 10*s.*,—the same premises, in consideration of the sum of 980*l.* 10*s.*, being the residue of the purchase-money, were, by Elizabeth Hughes and Lætitia Hughes, conveyed to William Watkins, his heirs and assigns, to the only proper use and behoof of William Watkins, his heirs and assigns for ever.

By an indenture of settlement bearing date the 25th day of April 1755, made between William Watkins and Philadelphia his wife, of the first part; Ann Constable therein stated to be the sister-in-law, but in fact being sister of the half-blood, of the said Philadelphia, of the second part, and Thomas Symonds of the third part,—after reciting the effect of the indenture of release of the 29th of January 1755, and that such purchase so made by William Watkins was agreed for and made by him with the approbation of Ann Constable, who advanced him the sum of 980*l.* 10*s.* the consideration money for the purchase thereof, upon condition that such estate and premises should be settled and conveyed to the uses thereinafter expressed—it was witnessed that the said lands were thereby conveyed to the said Thomas Symonds, to the end, intent and purpose that the said Ann Constable might thereout receive an annuity of 30*l.* for and during the term of her natural life, and subject thereto, and to the said mortgage sum of 1500*l.*, to the use and behoof of the said William Watkins and Philadelphia his wife, for and during the term of their natural lives, and the life of the survivor of them, without impeachment of waste during the life of William Watkins only, and from and after the decease of the survivor of them, to the use of the heirs of the body of the said Philadelphia by the said William Watkins lawfully begotten, and in default of such issue to the use and behoof of the right heirs of William Watkins: and William Watkins thereby covenanted that he had done no act to charge or incumber the premises. This, therefore, is a settlement, not of the lands therein mentioned, but of the equity of redemption of those lands only, subject to the annuity of 30*l.* per annum to Ann Constable, and subject to the mortgage of 1500*l.* and interest. If William Watkins had afterwards paid this mortgage-money, he was at liberty to keep the mortgage on foot for his own personal benefit, and as against all persons claiming under the settlement. The whole consideration of the settled property was paid by the sister of the wife; and though within the letter of the statute of 11 Henry 7. this may be considered as a purchase by the husband, yet it is not a case within the equity of the statute; the husband being, in his character of purchaser, merely the instrument of the wife's sister, and having made no provision whatever for the wife or her issue.

I fully adopt the principle of those authorities in which it is held that, where an estate is settled partly in consideration of the marriage, and partly in consideration of money paid, the consideration of marriage will prevail, and will bring the case within the statute: but these authorities have no application to this case.

The bill must be dismissed, and must be dismissed with costs.

Palmer *v.* Scott.

Russell and Mylne, 391.

The written undertaking of one party will be enforced, although the other party is not mutually bound by writing.

Rolls.—March 1, 1830.

HAMPSON had received and disbursed moneys as the solicitor and agent of the plaintiff Palmer; and in 1822, on the occasion of the sale of a farm, called Farley, belonging to the latter, the purchase-money, amounting to upwards of 3000*l.*, came into the hands of Hampson.

On the 23d of December 1822, Hampson wrote to Palmer in the following terms:—"I have great pleasure in informing you that the Farley purchase is now finally settled. I have on the other side sent you the particulars, with the balance paid to me, amounting to 3261*l.* 15*s.* I will endeavour to obtain, very soon, a security for this sum; but if I should not be successful, I will transfer to you a mortgage to pay you 4*l.* per cent for the interest of the money until it is invested." In a letter of the 14th of April 1823, Palmer complained that he had received no document to show what had become of the purchase-money of Farley, and pressed for a statement of his account. Hampson, in reply, stated that he would be in London shortly after Whitsuntide, when he would bring with him a security for 3000*l.* and settle the balance.

In June Mr Palmer again pressed for a settlement; and on the 17th of June, Hampson answered as follows:—"I will in a few days make out a statement of the account, with a remittance for the balance, and an acknowledgement that I have in my hands a mortgage deed for 3000*l.*, with an undertaking to assign it to you when required. This, I trust, will be satisfactory for the present." On the 15th of July, Hampson again wrote to Palmer, saying,—"I have on the other side sent you an acknowledgement of having the security of 3000*l.* and a draft for 361*l.* 15*s.* viz. 261*l.* 15*s.* being the balance received of Mr Crawley, in December last, and 100*l.* on account of the timber."

The acknowledgement was in the following words:—"15th July 1823. I acknowledge to have in my hands a mortgage deed made by Thomas Nicoll to me, of an estate at Studham in the county of Bedford, for securing the sum of 3000*l.* and interest; and having received this sum of John Sharpe Palmer, Esq., in December last, I do hereby undertake, when thereto required by him, to execute a transfer of this mortgage to him. Leonard Hampson."

Mr Palmer's answer was dated on the following day, and was in these words:—"I have this moment received your obliging letter, enclosing a draft on sir John Perring, Bart., Shaw, Barber & Co., for 361*l.* 15*s.* I shall be truly glad to receive a statement of debtor and creditor, which you kindly promise to send on your return home, as I do not know how to arrange my accounts till our affairs are settled."

On the 9th of August Mr Palmer wrote to Mr Hampson as follows:—"I have received this morning a letter from my solicitor at Chelmsford, informing me that he has entered into an agreement for the purchase of a

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small farm contiguous to mine in Essex, which my friends have recommended as particularly advantageous to the little property I possess there. It is therefore become absolutely requisite to arrange my affairs with you, for which purpose I intend coming to Luton either the latter end of next or the beginning of the week following, when I hope it will be convenient to you to give me an hour or two some morning, that I may discharge my debts, and may be enabled to form an idea what money I shall have at my disposal."

This letter was followed by another, dated the 13th of August, which was in these words: "As I have not received any answer to my letter of Friday last, I conclude you are from home, &c. &c. I shall not have 3000*l.* to put out on mortgage, as I shall want 1000*l.* to pay for my late purchase about the middle of September. I depend upon this, as the 3000*l.* was left in your hands as a temporary arrangement, agreeable to your desire."

Hampson died insolvent, without having paid the 3000*l.* to Mr Palmer, and without having assigned the mortgage. The bill was filed against his representatives to compel an assignment of the mortgage, pursuant to his undertaking of the 15th of July 1823.

Mr Treslove and Mr Rawlins, for the plaintiff.

The letter of the 15th of July contains an express undertaking by which Hampson was bound, unless Palmer rejected it. Far from rejecting it, Palmer expresses himself satisfied with the communication, retains the undertaking, and acquiesces in the arrangement. It is true that he shortly afterwards presses Hampson for a settlement of accounts, and states that he would not have the 3000*l.* to lay out on mortgage, as he would want 1000*l.* to complete a purchase which he had made. But all this is perfectly consistent with his having acceded to Hampson's undertaking to hold Nicoll's mortgage as a security for the debt due to him, Palmer. Hampson and Palmer had other pecuniary dealings besides the transaction as to the 3000*l.* There was no intention on either side that the money should remain permanently in Hampson's hands; the arrangement was merely temporary: Palmer might at any moment call in the whole or any part of the money in Hampson's hands: but so long as any part of the money remained with Hampson, Nicoll's mortgage was to be a security for it.

Mr Bickersteth and Mr Barber, contrà.

The acknowledgement inclosed or contained in the letter of the 15th of July, was merely a proposal; and in order to constitute an agreement, there ought to have been an acceptance of it in writing, on the part of Palmer. An agreement is not perfect till both parties are bound; here Palmer never was bound; and he never considered himself bound. The offer made to him was, that he should become mortgagee of Hampson's interest in a mortgage; to that offer he never acceded: on the contrary, before four weeks had elapsed, he was pressing Hampson for a settlement of accounts, and payment of the money.

The Master of the Rolls. Where there is a proposal merely, it must, to constitute an agreement, be accepted by writing: but here it is not a proposal, but an express undertaking, which this court will compel the party signing it specifically to perform, although the other party has not bound himself by writing.

Green *v.* Spicer.

Russell and Mylne, 395.

Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust* during his life, his interest passes to his assignees under the insolvent act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund.

Rolls.—March 2, 1830.

ROBERT PINNING, the elder, by his will devised certain real estates to John Spicer and Daniel Robertson, and their heirs and assigns, "upon trust to let and manage the same, and receive the rents, issues and profits thereof, and to pay and apply the same rents, issues and profits to or for the board, lodging, maintenance and support and benefit of my son Robert Pinning, at such times and in such manner as they shall think proper, for and during the term of his natural life; it being my wish that the application of the rents and profits for the benefit of my said son may be at the entire discretion of the said John Spicer and Daniel Robertson, and the survivor of them, and the heirs and assigns of such survivor, and that my said son shall not have any power to sell or mortgage, or anticipate in any way the same rents, issues and profits, or any rents, issues and profits, dividends or interests, derived under this my will."

Robert Pinning the younger had taken the benefit of the act for the relief of insolvent debtors; and the bill was filed by the assignee, praying that he might be declared entitled to the rents and profits of the devised hereditaments during the life of Robert Pinning the younger.

Mr Bickersteth and Mr Girdlestone, Jun., for the plaintiff.

The mode of applying the income for the son's benefit is in the discretion of the trustees; but they have no power to withhold it from him, or to apply it otherwise than for his benefit; therefore, he takes a life estate in this property: and there is no clause in the will which makes his interest determine, in the event of his attempting to assign or incumber it, or of his becoming a bankrupt or insolvent. The son being thus tenant for life of the property, the proviso which declares that he shall not have power to sell, mortgage, or anticipate the income, will not prevent his life estate from passing to his assignee. Graves *v.* Dolphin, 1 Sim. 66, 1 Swanston, 481, n.; Brandon *v.* Robinson, 1 Rose, 197, 18 Ves. 429.

Mr Agar and Mr Parker, contrà.

The son can claim nothing under the will, except through the discretion of the trustees. He could not have compelled them, through the interposition of this court, to have paid him over any part of the rents, if they, in the honest exercise of their discretion, thought that it would be for his benefit to keep the income of this property for some time out of his control; and the assignee cannot have a better right than the insolvent himself would have had. The interest of the son is only a species of possibility, which will not pass to an assignee. Thomas *v.* Freeman, 2 Vernon, 563. If the

assignee is entitled, the discretion of the trustee is at an end; that is, an essential part of the devise is annihilated.

The Master of the Rolls. The question in the cause is, whether the testator's son, Robert Pinning, takes any estate or interest under the will, other than by the exercise of the discretion of the trustees.

Robert Pinning takes a vested life estate of which the trustees cannot deprive him by any exercise of their discretion: they are bound to apply the rents, issues and profits for the benefit of Robert Pinning, and their discretion applies only to the manner of the application.

Decree for the plaintiff.

Matthews *v.* Maude.

Russell and Mylne, 397.

A testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7000*l.* bank stock, which, after the brother's death, was increased by a bonus to 8750*l.*: The testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7000*l.*: The court decreed that the 8750*l.* passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother.

Rolls.—March 8, 1830.

THE residuary clause in the will of John Crozier, Esq., was in the following words: "All my remaining moneys and securities for money, either in the public or company's funds, or money on mortgages, or other security, and all my property of what nature and kind soever and wheresoever, I give and bequeath to my sister, Elizabeth Crozier, during her natural life, yet, so that she shall have powers to call in the whole or any part of that property, and to place out the same again either in government, bank, or South Sea annuities, or in security on land. And I moreover give to my said sister Elizabeth, and to her heirs and executors, the whole or any part of my said residuary property, on condition that she shall and do, by a will in writing duly executed by her, dispose of such whole or such part; but if she shall decline or forbear to make such a disposition by written will, then I direct that the whole or such part of said residuary property so undisposed of by my said sister shall, on her demise, be divided into four equal portions or parts; two of these parts shall be given to my nephew John Crozier; one other part I give to my brother Joseph Crozier, and the remaining part shall be equally divided among my sister Robinson's sons and daughters, or their legal representatives."

The testator died in 1806. He appointed John Mitchinson and Philip Wyatt his executors. Mitchinson alone proved the will.

The testator at the time of his death had 7000*l.* bank stock, which formed a part of his residuary property. The residue of the personal estate and effects of the testator, exclusive of this sum of bank stock, consisted of 4000*l.* three per cent reduced bank annuities, and 34,818*l.* 2*s.*

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8*d.* three per cent consolidated bank annuities. These stocks were transferred into or entered in the name of Mitchinson, and afterwards of Mitchinson's executors.

By the 56 Geo. 3. c. 96, which came into force on the 26th of June 1816, it was enacted, "that, in consideration of the advance of 3,000,000*l.* for the public service, the capital stock of the governor and company of the Bank of England should be increased and extended from the sum of 11,642,400*l.*, of which the same then consisted, to the sum of 14,553,000*l.* making an increase or addition of 2,910,600*l.* capital stock; and that the sum of 2,910,600*l.* capital stock should be appropriated and divided amongst the several persons, bodies politic and corporate, who were proprietors of bank stock on the 23d of May 1816, at the rate of 25*l.* for every 100*l.* of bank stock, which such persons, bodies politic and corporate, were then respectively proprietors of, or had standing in their respective names in the books kept by the governor and company for the entry and transfer of such stock, and so in proportion for a greater or lesser sum: and that such division and appropriation should be placed to the credit of the respective names of such persons, bodies politic and corporate, in the books of the governor and company accordingly: and that all such persons, bodies politic and corporate, should, from the time of such division and appropriation, be lawfully entitled to the additional sum of bank stock so placed in or to the credit of their respective names, and respectively be entitled to be paid the same rate of dividend thereon, and to possess and enjoy the same profits, privileges, and advantages in respect thereof, in like manner to all intents and purposes as they were entitled to be paid, possess and enjoy, in respect of the bank stock which stood in their respective names on the 23d of May 1816."

In pursuance of this act, the sum of 7000*l.* bank stock, which formed part of the residue, was increased to 8750*l.*; and the additional 1750*l.* was, on the 29th of June 1816, entered in the books of the Bank of England in the names of the executors of Mitchinson.

The sister, Elizabeth Crozier, made her will on the 16th of July 1816, inter alia, in the following words: "And as to all such moneys as now constitute the residue of the personal estate of my said late brother, John Crozier, and which, by virtue of his will, I am enabled to will and dispose of, consisting of 7000*l.* bank stock, 4000*l.* three per cent reduced bank annuities, and 34,818*l.* 2*s.* 8*d.* or thereabouts, three per cent consolidated bank annuities; and as to all my own moneys, goods, chattels, and personal estate and effects whatsoever or wheresoever, after payment of my debts and legacies and testamentary and funeral expenses, and subject thereunto, I do hereby, in exercise of every power in me vested, or me hereunto enabling, give, bequeath, limit and appoint the same and every part thereof respectively, unto George Robinson, Elizabeth Matthews, Deborah Richardson, Joseph Henderson, Jane Macadam, and Ann Henderson, in equal shares: and I direct the same to be paid or transferred to them the said George, Elizabeth, Deborah, Joseph, Jane and Ann, accordingly, as soon after my decease as conveniently may be."

The bill was filed by appointees under the will of Elizabeth Crozier, and the question in the cause was, whether the 8750*l.* bank stock passed by her will, or only the original 7000*l.*?

Mr Bickersteth and Mr Duckworth, for the plaintiffs, contended, that the will manifested a plain intention in the testatrix to dispose of every

[Matthews *v.* Maude.]

thing which constituted part of the residue of her brother's personal estate, or which, under his will, she had power to bequeath. In enumerating the particulars of property she had fallen into a mistake: probably in consequence of her not being aware that the bank stock had been increased by a bonus, which, however, was not actually placed to the credit of the testator's estate till a few days after the right to it accrued, she had stated the amount of bank stock according to what it had previously been, instead of including in her estimate the 25*l.* per cent which had been lately added to the capital. But such an inaccuracy in the specification of particular sums would not prevent the court from giving effect to the intention manifested by the general tenor of the bequest. Milner *v.* Milner, 1 Ves. Sen. 107.

The defendants would probably rely on the case of Norris *v.* Harrison, 2 Mad. 268, where bequests of 1400*l.* and 1400*l.* bank stock, were held not to pass the additional capital given by the 56 Geo. 3. c. 96. But the decision in that case proceeded on the ground that the testator had given only a specific amount of the bank stock; that there were no words in the will which manifested an intention to give more than a specific sum; that the will was made before the act giving the bonus was passed; and that there was no ground for supposing that the testator meant to give a portion of capital which did not then exist.

For the defendant it was argued, that the testatrix had, so far as related to bank stock, disposed only of 7000*l.*, and that Norris *v.* Harrison was an authority in point. It must not be inferred that she would have disposed of the whole 8750*l.* bank stock in the same way as she chose to dispose of a much less sum. The testatrix was either aware or not aware that the bonus had been given by the act of parliament. If she were not aware of the circumstance, she could not have meant to give a thing, of the existence of which she was altogether ignorant: if she was aware of it, the specification of a sum of 7000*l.* bank stock, and the omission to make any mention of the bonus, afforded clear proof that she meant to appoint only the 7000*l.*

The Master of the Rolls. This is a question of intention; and it cannot be doubted, from the language used, that the testatrix meant to dispose of all the residuary property of her brother, although her enumeration of that property was not correct.

Ponton *v.* Dunn.

Russell and Mylne, 402.

In a partnership deed it was stipulated, that the testator's interest in the partnership concern after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint, and in default of appointment, that it should devolve to his wife; in case of her death, to his children in equal shares; and in case of the death of all his children, to his executors or administrators: Held, that the true construction of this, is not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will.

[Ponton *v.* Dunn.]

The testator made a will, not containing any allusion to the power, by which he gave all his estate and effects to one of his children: Held, that his interest in the partnership passed by this bequest.

Rolls.—March 8, 1830.

BY an indenture dated the 25th of December 1825, John Dunn and Joseph Bland agreed to become partners in the business of a tailor for a term of seven years. John Dunn was to bring in three-fourths of the capital; and three-fourths of the profits were to be paid to him, his executors, administrators and assigns. One of the stipulations contained in the deed of co-partnership was in the following words: "that no benefit or advantage shall come or accrue to the said Joseph Bland in case of the death of the said John Dunn, before the expiration or other sooner determination of the said co-partnership, or otherwise howsoever, or of or in any stock or stocks, goods, debts, or other things belonging to the said co-partnership trade; but in case the said John Dunn shall happen to die before the expiration or other sooner determination of the said co-partnership term, that then the said co-partnership trade or business shall be carried on by the said Joseph Bland for the residue of the said term, for the benefit of himself and such persons or person as the said John Dunn shall by his last will and testament in writing, or any codicil thereto, name and appoint; and in default of such appointment, for the benefit of the widow of the said John Dunn; or if she shall be dead, for the benefit of his children, him surviving, in equal shares, or in such other manner as shall be mutually agreed upon between such children; and in case of the death of all and every of the children of the said John Dunn, for the benefit of his executors or administrators: such persons or person, or the said widow, children, or executors, or administrators of the said John Dunn, to stand precisely in his place and stead, and to be entitled to the same shares, proportion and interests in, and to have the same control over (as to the management and carrying on) the co-partnership trade, and the capital, increase and profits thereof, as by the terms of these presents the said John Dunn would have been entitled to himself, if living."

John Dunn made his will in the following words:—This is the last will and testament of me, John Dunn, of Bedford street, Covent Garden, in the county of Middlesex:—I desire that I may be interred in the burial ground belonging to the nearest church where I may depart this life, but not in a vault. I direct the payment of all my just debts, and funeral and testamentary charges and expenses. I give to my dear daughters, Catherine Ponton and Isabella Rodber, the sum of 50*l.* each, for mourning: and as to all my freehold, leasehold, and all other my estate and effects, of whatsoever nature or description the same may be situate and being, I give, devise and bequeath the same, and every part thereof, unto my dear son, John William Dunn, a major in his majesty's service, his heirs, executors, administrators and assigns, absolutely: I appoint my said dear son sole executor; and hereby revoking all former wills by me at any time heretofore made, I publish and declare this to be my last will and testament, as witness my hand and seal the 11th day of April 1827. J. Dunn."

He died a few days afterwards, leaving his two daughters, Mrs Ponton and Mrs Rodber, and his son, John William Dunn, surviving. His wife had died in his lifetime. The business had continued, since his decease, to be carried on under the provisions of the deed, and had been profitable.

The testator had, after the execution of the co-partnership deed, given large portions to his two daughters upon their respective marriages.

[Ponton *v.* Dunn.]

The bill was filed by Mrs Ponton and Mr and Mrs Rodber. It charged that the testator had not made any appointment of his share of the business; that he had not by his will referred or alluded to his power of appointment; and that he did not by his will execute, or intend to execute, his power. It, therefore, insisted that his interest in the partnership, in default of such appointment, passed under the provisions of the deed to his three children (his wife having died in his lifetime), in equal shares; and it prayed that the plaintiffs might be declared entitled to two-thirds of the testator's share of the partnership trade, stock and effects, and to a like proportion of the profits during the residue of the term.

Mr Tinney, Mr Pemberton and Mr Koe, for the plaintiffs.

The interest of John Dunn in the partnership would have ceased on his death, had not the partnership deed stipulated otherwise; and by the words of that stipulation the rights of those who claim through him must be determined. Now the stipulation is, that the business should be carried on by Bland, after the death of Dunn, for the benefit of himself and such persons as Dunn should, by will, appoint; in default of appointment, for the benefit of Dunn's widow; or, if she died, of Dunn's children; and in case of the death of all his children, for the benefit of his executors or administrators: and the persons to whom the subsequent profits are thus given, are to take also Dunn's share of the capital. The deed amounts to a settlement of Dunn's interest in the partnership from the time of his death, on his widow, or, if she is dead, on his children, subject to his power of appointment, by which their interests may be defeated. The widow is dead; and the only question therefore is, has he by his will made any appointment? The will does not profess to be an execution of the power; it does not refer to the power, nor to the subject of the power; it is merely a general disposition of the testator's estate and effects. The will, therefore, is not an execution of the power; and the testator's interest in the partnership must go to the persons to whom, in default of appointment by him, it is limitted by the deed. It cannot pass by the will as a part of the testator's assets, because it was only in the event of the decease of his wife and of all his children in his lifetime, that the property in question was to go to his executors and administrators. In the events which have happened, the executor is excluded by the limitations of the deed; and under those limitations the children are entitled to equal shares.

Mr Bickersteth and Mr Wakefield, contrà.

Dunn and Bland are the only parties to the deed; and the sole object of it was, to limit and fix their respective interests in the business. They agree that three-fourths of the profits during the whole continuance of the partnership shall, notwithstanding Dunn's death before the expiration of the term, be paid to him, his executors, or administrators; and to avoid any doubt which might have arisen on the point, he stipulates expressly that he shall have the right to dispose by will of his interest in the business and profits. The deed made his interest in the future profits a part of his estate; and it must pass by the general words of the will. In no part of the deed can a single phrase be found, which manifests an intention on the part of Dunn to make a settlement of his interest in the partnership: his only object was to fix and ascertain his rights as between him and Bland, and to secure to himself and his legatees, or personal representatives, three-fourths of the profits during the whole of the term. It would be extravagant to allege that there is any thing in the deed which would

prevent his share of the capital from passing by his will as part of his general estate; and the future profits must go along with the capital.

The MASTER of the ROLLS. It is true the words "name and appoint" are used in the deed; but considering the relation of the parties, I cannot understand them to be used with a view to create a power of appointment in its technical sense, and to limit the testator's power of disposition by will over this part of his property. Without this stipulation those who claimed through him would have had no title to share in the partnership profits after his death; and it is a mere bargain with his partner, that he should have a power of disposition by will, and if he died without a will, that the property should devolve to his family in the manner stated. This property will therefore pass under the description in his will, of "all other his estate and effects, of whatsoever nature or description."

The bill was dismissed.

Winterton *v.* Crawfurd.

Russell and Mylne, 407.

That to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will. *Semble.*

Rolls.—March 8, 1830.

THE testator, William Board, devised the residue of his real estate, subject to a term of years, to trustees and their heirs, upon trust, as to one-third part, to pay the rents and profits to the separate use of his daughter, Harriett Bodicoate, during her life, and from and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her, or their share or shares, in trust for the survivors or survivor, and others or other of them, share and share alike, and the several and respective heirs of the bodies of such survivors or survivor, and others or other of them. Then, after giving the other two-thirds by similar limitations, to his daughters Louisa Moreton and Fanny Board respectively, for life, to their separate use, with remainder to their children, he continued his will in the following words:—"And I do hereby declare my will and mind to be, that, in case one or more of them, the said Harriett Bodicoate, Louisa Moreton, and Fanny Board, shall happen to die without issue of her or their body or bodies, then the share or shares of her or them so dying without issue shall be in trust for, and I do hereby direct, limit, and appoint the same, to be in trust for the survivors or survivor of them my said daughters, for and during the natural lives or life of such survivors or survivor, the same to be by the trustees for the time being held and enjoyed for and during the joint natural lives of such survivors of my said daughters, in trust for them as tenants in common, and not as joint-tenants, and the rents and profits of the accruing share or shares, to which each of them my said daughters shall or may become entitled of and in my said estates, in the events aforesaid, to be for their

[Winterton v. Crawfurd.]

and each of their sole and separate use, and in such and the same manner as is hereinbefore declared respecting their original parts and shares thereof; and from and immediately after the decease of the said survivor of my said daughters, then in trust for all and every the child and children of the bodies or body of the survivors or survivor of my said daughters, lawfully to be begotten (such children taking *per stirpes* and not *per capita*, the shares of the rents and profits, whereof their respective parents will, if living, be entitled to for life under this my will), to be equally divided between or among them, if more than one, share and share alike, to take as tenants in common and not as joint-tenants, and the several and respective heirs of the bodies of all and every such child and children lawfully issuing; and in case any one or more of such children shall happen to die without issue of his, her, or their body or bodies, then as to the share or shares of him, her or them so dying without issue, in trust for the survivors or survivor, and others or other of them, to be equally divided between or among them, if more than one, share and share alike, to take as tenants in common and not as joint-tenants, and the several and respective heirs of the bodies of such survivors or survivor, and others or other of them; and if all such children but one shall happen to die without issue of their bodies, or if there shall be but one such child, in trust for such surviving or only child, and the heirs of his or her body: and in default of such issue, then in trust for my two nephews, John Board and Richard Board, for their lives," with limitations over to their children.

Fanny Board intermarried with Gibbs Crawfurd, and died, leaving children. Afterwards Louisa Moreton died without issue. Harriett Bodicoate had intermarried with the earl of Winterton; she had no issue, and was advanced in years. From the time of Mrs Moreton's death, a moiety of her third part of the rents had been paid to lady Winterton; and it had been considered that the remaining moiety belonged to Mrs Crawfurd's children.

The bill was filed by lady Winterton and her husband, for the purpose, among other things, of having it declared that she was entitled for life to the whole of that one-third share of the real estate which had been given to Louisa Moreton.

Mr Pemberton and Mr Fane, for the plaintiffs.
Mr Bickersteth, Mr Barber and Mr Rolfe, for some of the defendants.
Mr Tinney and Mr Spurrier, for others of the defendants.

The argument on behalf of the children of Mrs Crawfurd was, that the words "survivor and survivors" necessarily meant in one part of the will "other and others," and ought, therefore, to receive the same meaning throughout the whole of the instrument. When the testator declares that the share of a daughter dying without issue should be "in trust for the survivor and survivors of his daughters during the natural life or lives of such survivor or survivors as tenants in common," and "from and immediately after the decease of the survivor of his daughters, in trust for all and every the child and children of the bodies or body of the survivors or survivor of his daughters lawfully to be begotten, such children taking *per stirpes* and not *per capita*, the shares of the rents and profits whereof their respective parents will, if living, be entitled under this will," the words "survivors or survivor," in the phrase "children of the bodies or body of the survivors or survivor," must mean "others" or "other:"

for if they do not receive that construction, it would follow that, as Mrs Crawfurd never was a surviving daughter, her children could not take, upon the death of Mrs Moreton and lady Winterton without issue, the shares given to those two ladies for life. But it clearly was the intention of the testator that, in that event, the issue of Mrs Crawfurd were to take; and the fund was not to go over to the nephews, unless there was a failure of issue of all the daughters. Since, then, the words "survivors or survivor" must be read "others or other" in the gift by way of remainder to the children of the surviving daughters, they should receive the same construction in the gift of the share of a daughter dying without issue to the "survivors or survivor" of the daughters; and the children of Mrs Crawfurd would, upon the death of Mrs Moreton, become entitled to that moiety of the income of Mrs Moreton's share, which their mother, if alive, would have unquestionably taken. It was apparent that, throughout the whole of the will, the testator used indiscriminately the phrases "survivors or survivor, and "others or other."

On the other hand, the plaintiffs contended, that, on the death of Mrs Moreton without issue, the income of the whole of her share went, according to the words of the will, to "the survivors or survivor;" that is, to lady Winterton, who was then the sole surviving daughter of the testator: and there was no reason for departing from the natural and proper meaning of the words. On the contrary, it was clear that the testator did not mean that any part of the share of a daughter dying without issue should go to the children of a daughter, so long as any of his daughters lived; for the gift to the children was only "after the decease of the survivor of his daughters." If, in order to accomplish the general intention of the testator, it were necessary, in the clause which followed, to give to the words "survivors or survivor" the sense of "others or other, it did not follow that they ought to receive the same construction in a preceding part of the will; especially as it was apparent on the face of the instrument, that the testator distinguished between "survivors or survivor" and "others or other."

The counsel for the nephews contended, that, in the event of lady Winterton's death without issue, they would be entitled to take the whole of the shares of her ladyship and Mrs Moreton, to the exclusion of the children of Mrs Crawfurd, because these children did not come within the description of "children of the bodies or body of the survivors or survivor of the testator's daughters;" and the words "survivors or survivor" ought there to be read literally, and were not to be considered as synonymous with "others or other." But ultimately they withdrew from the argument, on the ground that it was premature to discuss this question while lady Winterton was alive.

The Master of the Rolls. In order to effectuate the intention of the testator, the court sometimes gives to the word "survivors" the sense of "others." Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separare use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent.

It is true that, in the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words survivors or sur-

vivor may receive a more enlarged meaning(*a*). The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters; and this intention would be defeated, if, upon the death of lady Winterton without issue, which is stated to be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during lady Winterton's life; and all that can now be done is to declare that lady Winterton is entitled for life, to her separate use, to the one-third share of the real estate which by the will was given to her sister, Louisa Moreton.

Breedon *v.* Breedon.

Russell and Mylne, 413.

A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper: but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons:

Held, that the sons were only joint tenants for life with a power of sale;

That they could make a good title, and give discharges for the purchase-money;

That they were joint tenants for life of the purchase-money; and that, upon the death of the survivor, it would devolve to their children.

Rolls.—March 13, 1830.

THE part of the will of Dr Breedon, on which the question in the cause arose, was in the following words: "And I give and bequeath unto my dear sons Charles and William Breedon (except as hereinafter excepted), my wagons, carts, horses, farming stock, hay, corn, &c. at Bere Court or Flower Farm, or any other place in the parish of Pangbourn, conditionally, that all horses or any horse or mare which shall have been in my service, and are more than fourteen years old, shall never be disposed of, nor put to any harder work than harrowing light land, or drawing very light cart-loads, or if lame or broken-winded, not to be used at all, but to be well kept and taken care of in meadows and straw yards; and during such time I desire that four shillings a week shall be paid by Charles and William Breedon to an aged man, of good character, for looking after the said horses. I also give and bequeath to the said Charles and William Breedon the farm called Flowers, including Brook, Furlong, Herridge's Land, Woods, and Bere Leys, with permission for them to dispose of the said farm to my son John Symonds Breedon, or next person in possession of the manor of Pangbourn and estate of Bere Court, if they think proper to do so; but advise them to be very cautious and circumspect in this matter, and to make due provision for the fulfilment of the above condition respecting the aged horses by the purchaser of the said property; and in case my son, or next in possession of the said manor, should not agree to purchase the same, and my said sons Charles and William should wish to let the said farm, they may do so, subject to the same restrictions. And

(*a*) See Wilmot *v.* Wilmot, 8 Ves. 10; Davidson *v.* Dallas, 14 Ves. 578; Crowder *v.* Stone, 3 Russell, 223; Milsom *v.* Awdry, 5 Ves. 465; Doe *v.* Wainwright, 5 Term Rep. 427.

if the said farm should not be sold, I bequeath the same, after the decease of either of my said sons, to the survivor; and after the decease of both, to be sold by auction, and the purchase-money thereof to be equally shared between the children of the said Charles and William; and if they or neither of them shall not have left any child or children, then to be shared equally between the daughters of Henry Breedon, Elizabeth Hulme and Jane Breedon, if she should have any."

The testator's sons Charles and William entered into a contract with their brother, John Symonds Breedon, for the sale to him of the farm called Flowers, including the other lands therewith connected by the will, subject to the condition as to keeping the aged horses; and the bill was filed by them for the specific performance of this contract.

Two questions were made: first, whether Charles and William could give a sufficient discharge for the purchase-money; and secondly, what interest the parties would respectively take in that purchase-money.

Mr Pemberton and Mr Bellasis, for the plaintiffs.

A testator may give a fee either by words of express limitation, or by manifesting his intention to devise the lands for a purpose which requires that the devisees should have the fee. Here the property is devised to Charles and William, and they are to dispose of it: the testator, therefore, must have meant them to take the fee. If they take the fee, they take it beneficially; for there are no words to limit or control the devise to them, or to make them trustees for others, except in the event of the farm not being sold. The limitations over to the children of Charles Breedon and William Breedon, and to the daughters of Henry Breedon, Elizabeth Hulme, and Jane Breedon, are only "if the farm should not be sold:" if the farm is sold by William and Charles, there is no gift of any interest in the purchase-money to those children or daughters. It may be said that such a disposition of property is somewhat singular. It is, however, the disposition contained in this will; and the testator may have adopted it from an anxious desire that these particular lands should be sold to the person in possession of the manor of Pangbourn and the family estate. The gift of the purchase-money to Charles and William, if the sale took place during their lives, was a premium to induce them to sell.

If Charles and William take the absolute beneficial interest in the lands in the event of their selling them, it is clear that there can be no objection to the title. But even if they do not take the absolute beneficial interest, and if they are to be considered as mere tenants for life, with a power to sell, still it is plain that the testator intended that they should have an immediate power of sale; and as infants and persons not *in esse* were to be interested in the purchase-money, it must be inferred, according to Sowarsby *v.* Lacy, 4 Mad. 142; Doran *v.* Wiltshire, 3 Swanston, 699; Lavender *v.* Stanton, 6 Madd. 46, that Charles and William were to have power to grant receipts for the purchase-money. In either way, therefore, they can make a good title to the purchaser.

Mr Bickersteth, for the purchaser.

The testator has not given Charles and William the fee by words of legal limitation: he has given them only an estate for life, with a power of selling the property to certain persons: and there is no purpose expressed in the will, which requires that they should take more than an estate for life, with a power of sale. If they do not take the legal fee, there is no pretext for saying that they are entitled absolutely to the pur-

chase-money ; and even if the legal fee were in them, they would be merely tenants for life of the purchase-money, with remainders over, in the same manner as if the lands had not been sold till after the death of the survivor. It would be absurd to suppose that the testator meant that the tenants for life should take the purchase-money absolutely, if they exercised the power of sale, when it is clear they were not to take it, if the sale did not happen till after their death ; in other words, that their title to the purchase-money should depend on their own pleasure. If the object of the testator had been to secure the union of these lands with the family estate, he could easily have made it imperative on Charles and William to sell them to the person in possession of the manor of Pangbourn and the Bere Court property.

Thus, the plaintiffs are merely tenants for life, with a power of sale : there is no authority to them to sign receipts for the purchase-money ; and in that purchase-money infants and persons not *in esse* are or may be interested : the plaintiffs, therefore, cannot give the purchaser a secure title. Sugd. Vend. 498, 6th ed.

Mr Rolfe and Mr J. Russell, for other defendants.

The Master of the Rolls. The words of the will import an absolute power of sale, if Charles and William so think fit, to the persons described in the will ; and, consequently, Charles and William are capable of giving an effectual discharge for the purchase-money.

It being in the option of Charles and William whether they would or not make sale of the estate, it is not to be intended that the testator meant that, if they thought fit to sell the estate, they should become entitled to the purchase-money for their own use ; but that, if they did not sell the estate, they should take only a limited interest in it. The rational construction is, that all parties were to take the same interest in the produce of the estate, if sold by them, as is expressly limited if the sale by Charles and William did not take place. Charles and William will, therefore, be only joint tenants for life of the purchase-money, with benefit of survivorship ; with remainders over, according to the provisions contained in the will, in case the estate was not sold by them.

Cockerell *v.* Cholmeley.

Russell and Mylne, 418.

A court of equity relieves against a defective execution of a power only when the defect consists in the want of some circumstance in the manner of execution ; and it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law.

In order to work confirmation, the party said to confirm must know the law as well as the fact.

Where judgment had been given at law, that a power of sale had not been well executed, the defendants at law, claiming under the alleged execution of the power, filed a bill in equity to have the defect in the execution of the power supplied, and the instrument by which it had been executed rectified; and they at the same time prosecuted a writ of error on the judgment : the suit in equity having been brought to a hearing, Held,

That the plaintiffs in equity were bound to elect either to have the bill dismissed, or to abandon the writ of error.

[Cockerell *v.* Cholmeley.]

Lands were devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property, or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and in the meantime to invest it in the public funds, and, for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.*, exclusive of the timber, which was to be taken at a valuation; and, it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed, by which he, in consideration of 2448*l.*, conveyed the timber to the purchaser, and the trustee, in consideration of 13,400*l.*, conveyed the land exclusive of the timber. Many years afterwards, the tenant for life being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much three per cent stock as 2448*l.* would have produced at the time of the sale. After the death of A., the next remainder-man, though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment, on the ground that the power of sale was not well executed: Held,

That a court of equity could not relieve against that judgment.

Rolls.—March 17, 1830.

THE instrument and transactions, out of which this suit arose, are stated in 3 Russell, 565, where the judgment of lord Eldon, on the cause shown against dissolving the injunction, is reported.

The letters between sir H. C. Englefield and the purchaser, which had been laid before lord Eldon, and introduced into the record by amendment, were proved: and the cause was now brought on to a hearing.

Mr Pemberton and Mr Cockerell, for the plaintiffs.

The questions to be considered, resolve themselves chiefly into two: first, what was the real character of the sale in 1783, now sought to be defeated? and, secondly, what is the effect of the subsequent transactions, and especially of the proceedings in the year 1806, in giving validity to that sale?

Upon the first point it is observable that, by sir H. Englefield's will, no personal confidence was reposed in the trustees; the powers were not confined to them as individuals, but were extended to their heirs. No reinvestment of the produce of the sales was to be made, unless with the concurrence of the tenant for life, to whom an option was left of treating that produce either as personal or as real estate; it being simply the duty of the trustees to see that an adequate price was obtained. That furnishes decisive evidence of the testator's intention, that every thing should depend upon the pleasure of the person beneficially entitled. The negotiation in 1782, for the purchase of White Knights, was carried on exclusively by Martin's agent on the one hand, and by sir H. C. Englefield, the then tenant for life, on the other, without the intervention of the trustees. The contract in which the treaty terminated, and which is recited in the deed of 1783, purported to be for a conveyance of the land by the trustees, and of the timber by the tenant for life. In truth, however, there was but one sale, and the whole formed a single and entire transaction. If, indeed, any doubt could remain as to the real nature of the transaction, that doubt would be set at rest by referring to the correspondence which formed the basis of the contract. The letters constitute a complete agreement in writing, made up of proposal on the one side, and acceptance on the other; and they at once supply materials for correcting the erro-

neous recital in the subsequent conveyance, and for explaining and getting rid of the difficulty which was fatal to the case at law(*a*). These letters establish, beyond dispute, that the full value was given for the property, and that the sale of the land and the timber was by one general contract entered into by the tenant for life, with the consent and approbation of the trustees. Coupled with the proposition which immediately followed, they specify the terms upon which the agreement was finally concluded, with sufficient precision to be the foundation of a decree for specific performance ; or, in another view, to enable the court to reform, according to the true intent of the parties, the conveyance afterwards executed to carry that agreement into effect. The indenture of 1783, therefore, must either be construed with the aid of the lights supplied by the correspondence, or the correspondence must be considered as forming the contract which was really intended to be effectuated, and the conveyance must be remoulded agreeably to it.

If these arguments should not prevail, still the steps taken subsequently by sir H. C. Englefield,—his reinvestment in 1806, of the produce of the sale of the timber, thereby in effect adding his sanction to what had been done, and recognizing it as entirely an act of the trustees, must give it complete validity : and even if that were otherwise, the conduct pursued by the present defendant,—his standing by while large sums were expended by the purchaser on improvements, his being privy to the measures for the appointment of new trustees, and his receiving to his own use a portion of the trust funds, the produce of the sale, amount in equity to such a confirmation of the transaction, that this court will not now suffer it to be overturned.

Mr Bickersteth and Mr Lynch appeared for the defendant, but were not called upon to argue.

The Master of the Rolls. The late sir Henry C. Englefield was, under the will of his father, entitled as tenant for life, without impeachment of waste, to a certain mansion-house and lands called White Knights, as to which a power of sale, to be exercised only at the request and by the direction of the person in possession for the time being, was given to two persons, of whom lord Cadogan was the survivor. In 1782, sir Henry C. Englefield, with the privity of lord Cadogan, entered into a treaty with the agent of sir Byam Martin for the sale to him of the White Knights property ; and a contract was concluded between sir Henry C. Englefield and sir Byam Martin's agent for the sale to him of the estate, exclusive of the growing timber, at the sum of 13,400*l.*, and for the sale of the growing timber at a valuation which amounted to 2448*l.* This contract was carried into effect by an indenture of bargain and sale, bearing date the 12th of May 1783 ; and it being then conceived, that, as sir Henry C. Englefield was tenant for life, without impeachment of waste, he was entitled to receive for his own benefit the amount of the valuation of the timber, he, in consideration of the sum of 2448*l.*, thereby conveyed the timber to sir Byam Martin ; and lord Cadogan, in consideration of 13,400*l.*, thereby conveyed to him the land, exclusive of the timber.

By the power of sale given to the trustees under the will of sir Henry Englefield's father, the produce of any sale was to be laid out in the purchase of other land to be settled to the same uses, and, in the mean time,

(*a*) Cholmeley *v.* Paxton, 3 Bing. 237.

was to be invested in the funds upon the same trusts; and the 13,400*l.* was accordingly so invested by lord Cadogan.

In the month of June 1786, sir Henry C. Englefield having discovered that he was not entitled to the amount of the valuation of the timber, transferred to lord Cadogan the sum of 3631*l.* 4*s.* three per cent consolidated bank annuities, being the amount of stock which 2448*l.* would have purchased at the time of the sale.

Sir Henry C. Englefield died without issue in 1822; and thereupon the defendant became entitled as next in remainder in tail, under the will of sir Henry Englefield's father, to the White Knights estate, or to the lands or stock which should be purchased with the price of the estate. The defendant was, during the life of sir Henry Englefield, aware of the fact that sir Henry Englefield had received the price of the timber, and had afterwards returned it to lord Cadogan; and, upon application made to parliament by sir Henry Englefield for authority to employ part of the purchase-money of the White Knights estate for some general purpose under his father's will, which had devised other considerable estates to the same uses, the defendant had notice of the application, as next in remainder to sir Henry Englefield, and did not oppose it.

After the death of sir Byam Martin, the duke of Marlborough became the purchaser of the White Knights estate, and, having greatly improved it, he mortgaged it to the plaintiffs, sir Charles Cockerell and Henry Trail, for a sum of 50,000*l.* Under a power of sale, contained in their mortgage deed, the estate was subsequently put up to auction, and purchased by sir Charles Blount at a sum of 36,000*l.*; and he, together with the duke of Marlborough and his trustee, have joined as plaintiffs with sir Charles Cockerell and Henry Trail in this suit.

In Michaelmas term 1823, the defendant brought a writ of formedon in the court of common pleas to recover the White Knights property, upon the ground that the power of sale under the will of sir Henry Englefield's father was not duly executed; and the judgment of that court was in his favour(*a*). Upon a writ of error to the exchequer chamber, this judgment was affirmed, and a writ of error from the exchequer chamber to the house of lords is still depending.

The present bill was filed to restrain the defendant from proceeding at law under the judgment which he had obtained in the common pleas; to have the benefit of the contract made by sir Henry Englefield with sir Byam Martin in 1783; to have the defect in the execution of the power supplied; and to have the indenture of the 12th of May 1783 reformed and amended, and made conformable to the contract.

At the opening of the cause, it was insisted for the defendant that the plaintiffs could not proceed at law and in equity at the same time, and that they must either abandon their writ of error in the house of lords, or dismiss the present bill. I was of that opinion; and the plaintiffs undertook to abandon the writ of error.

The plaintiffs have given in evidence a very long correspondence between the agent of sir Byam Martin and sir Henry Englefield prior to the indenture of the 12th of May 1823, for the purpose of proving that by such correspondence a contract in writing had been perfected between sir Byam Martin and sir Henry Englefield for the purchase of the estate and timber from the latter. It appears to me that this correspondence did

(*a*) This case is reported in 3 Bingham, 237, under the name of Cholmeley *v.* Paxton.

not contain a proposal and acceptance of all the terms of the contract; but it proves that, in the treaty, sir Henry Englefield dealt as the owner both of land and timber.

This is one of the most unfortunate cases that ever occurred in a court of justice. The parties concerned in the transaction complained of, acted with the most perfect fairness and integrity, and, after an enjoyment has been had under it of nearly half a century, and after a transmission of interests to other persons, and great improvements, so that the property has become more than double in value, it is sought to be recovered upon the restoration only of the original price. And it must be observed that the transaction at the time worked no injury to the defendant. It is not pretended that full justice was not done to his contingent interest in the price paid; and where all was just in substance, he comes into court and claims the property upon a mere mistake of form. But the law is with him; and in the exercise of the jurisdiction of a court of equity, I am fettered by precedent.

The plaintiffs call upon this court to supply the defect in the execution of the power, or to reform and amend the deed of the 12th of May 1783. A court of equity will, in favour of persons standing in the situation of the plaintiffs, supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will. But here it is at law decided, that there was no power in the trustees to sell the land without the growing timber, and there is no execution by the trustees of the power to sell the land with the growing timber; and I find no authority which applies to this case.

With respect to the reformation of the deed, it is true that a court of equity will, in favour of persons standing in the situation of the plaintiffs, relieve against a deed, which, by mistake of the drawer, does not effectuate the real intention of the parties. But can it be said that the drawer of this deed has mistaken the real intention of the parties? Can it be said, that it was not the real intention of sir Henry Englefield to convey the timber, and to receive the price, when he did actually convey the timber, and did receive the money and retain it for some years? Or can it be said that the trustee did not mean to convey the land alone, without the timber, when he receives the price of the land alone, and permits sir Henry Englefield to receive the price of the timber? And on the other hand, must it not have been the intention of sir Byam Martin to take the timber by the conveyance from sir Henry Englefield, and to take the land alone by the conveyance from the trustee, when he paid to the first the price of the timber, and to the trustee the price of the land only?

It has been argued, that the defendant, being aware of the facts of the case in the lifetime of sir Henry Englefield, has, by his silence, and by being a party to the application to parliament, confirmed the title of the plaintiffs. In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law; and here there is no proof that the defendant, at the time of the acts referred to, was aware of the law on the subject, nor was it even alleged in argument.

Upon the whole, I know no precedent for a decree in favour of the

plaintiffs, and consider myself bound, therefore, though reluctantly, to dismiss the bill; but in such a case, it must, of course, be without costs.

Young *v.* Everest.

Russell and Mylne, 426.

WHERE, upon a bill filed by a simple contract creditor, the only specialty creditor is restrained by injunction from proceeding in his action at law, and it turns out upon the Master's report, that the assets are insufficient to pay the specialty creditors, the executor will have his costs out of the assets, but not the plaintiff.

In such a case the specialty creditor, though not a party to the suit, may appear at the hearing on further directions without presenting a petition, if the case which he has to make depends only upon what appears in the Master's report.

Rolls.—March 18, 1830.

Harrison *v.* Courtauld(*a*).

Russell and Mylne, 428.

In equity, an objection to the competency of a witness is not waived by cross-examination. March 15, 1830.

THE plaintiff offered to read the evidence of a defendant who had disclaimed, but to whose competency there was a valid objection; it being

(*a*) Pigott *v.* Croxall.

The suit was instituted by parties claiming under a will, to set aside a subsequent codicil, on the ground that the testator was not of sound and disposing mind when he executed it. In support of the codicil the defendants had examined several witnesses who took legacies under it: and the plaintiff had cross-examined these witnesses on the merits. Their competency was objected to on the ground of interest; and it was insisted for the defendants, that the plaintiffs, by cross-examining them, had waived the objection.

Mr Heald and Mr Willis, for the defendants.

The fact, out of which the objection arises, was well known to the plaintiffs at the time of the examination; they do not choose to rely on the objection, but they sift the witnesses, as if they were in all respects competent. In Moorhouse *v.* De Passou, the interest which disqualified arose out of a particular agreement between the witness and the defendant: and the judgment of Sir William Grant proceeded on the ground, that the objection was not known to the plaintiff. "The waiver," says he, 19 Ves. 435, "arises from pursuing the examination after the objection to the competency of the witness is known; but it is difficult to see how an unknown objection can be waived." In The Corporation of Sutton Coldfield *v.* Wilson, 1 Vernon, 254,

[Harrison *v.* Courtauld.]

apparent on the bill itself that he had an interest in the success of the plaintiff. The principal defendant had cross-examined him on the merits at great length.

Mr Pemberton, objected to his competency: and, to prove that the objection was not waived by the cross-examination, cited Moorhouse *v.* De Passou, 19 Ves. 433, Cooper, 300.

Mr Bickersteth, contended, that here the fact of interest, out of which the objection arose, was apparent on the record: notwithstanding which, the defendant, with full knowledge of the objection, had cross-examined the witness, not merely to rebut the plaintiff's case, but to prove the defence.

The Master of the Rolls held, that the evidence could not be read.

the interest which disqualified was of a notorious character; and, accordingly, the objection was held to be waived by cross-examination.

Mr Tinney and Mr Russell, contrà.

It is not enough that the plaintiff knows or suspects that the witness is interested; he must have from the witness himself an admission of the existence of the interest, or he must have proof of it upon articles exhibited after publication passed: and as he is ignorant what answers are given to the several interrogatories till publication is passed, he cannot till then know whether there is a sufficient ground for objecting to the competency of the witnesses. He cannot safely omit to cross-examine, because it may turn out that the witness has denied all interest; and the party cannot be sure that he could afterwards show this denial to be false. The point was carefully considered by the barons of the exchequer in Scott *v.* Fenwick, Gwillim, 1255; and they laid down the rule in the following words:—"The rule of evidence in equity ought to be analogous to the courts of law. When the interrogatories are drawn, it is impossible for the party to know what answer the witness will give to them; consequently there is no opportunity of stopping in the course of the cross-examination, and of urging the objection, till after the depositions are published, and the evidence comes to be read in court. Then, if the party permits the evidence to be read, he thereby waives the objection to the competency of the witness; but if he uses the first opportunity that offers, by urging it at the hearing before the evidence is read, it ought to be admitted and to prevail."

In The Charitable Corporation *v.* Sutton, 2 Atk. 403(*a*), the objection to the competency of a witness was held to have been waived by "such of defendants as had cross-examined him and had thought proper to read his deposition."

Sir John Leach, Vice-Chancellor, rejected the evidence.

(*a*) See also Bland *v.* The Archbishop of Armagh, 3 Bro. P. C. 620, Toml. edit. There the objection went, not to the competency, but to the credibility of the witnesses; and their depositions had been read without objection.

West *v.* Berney(*a*).

Russell and Mylne, 431.

Learning as to what powers of appointment are capable of being extinguished or released.
Jan. 27, 1819.

IN this case the Master had reported that a good title was shown ; and exceptions were taken to the report. The question arose on the following instruments :

Sir John Berney, being seised in fee under a settlement made in 1789, conveyed the estate to the use of himself for life ; remainder to such one or more of his sons as he should appoint; remainder, in default of appointment, to his first and other sons in tail ; remainder to himself in fee.

In 1811, on the occasion of the marriage of his eldest son, sir John Berney was a party to a deed of settlement, to which the intended wife was also a party, and to a fine and recovery levied and suffered in pursuance thereof, whereby the estate was limited to the use of sir John Berney for life ; remainder to the use of Hanson Berney, his eldest son, for life ; remainder to the first and other sons of Hanson Berney in tail, with divers remainders over. And in this deed a power was given to the trustees, authorizing them, at the request of sir John Berney during his life, and after his death, at the request of Hanson Berney, to sell the estate ; and, after paying the incumbrances to which it was at this time subject, to invest the produce in the purchase of other estates to be settled to the same uses.

Sir John Berney had not previously executed any appointment in favour of his eldest son ; and a doubt occurring whether he might not still execute his appointment in favour of any other son, and so defeat the settlement, he, in 1815, executed a deed of appointment in favour of the eldest son in fee, reciting, that it was for the purpose of confirming the marriage settlement of 1811.

Against the title, it was urged by Mr Preston, that the power of appointment in the deed of 1789 was merely collateral, and being for the benefit of particular objects, was an interest in them, and in the nature of a trust in sir John Berney, and, therefore, could neither be released nor extinguished by him ; that the power of appointment remained in him, therefore, notwithstanding the settlement of 1811; and that it was not well executed by the deed of 1815, because the eldest son was not capable of receiving an interest in the estate inconsistent with the settlement of 1811. He cited Co. Litt. 237 a, 265 b; Albany's case, 1 Rep. 111, and Digges's case, 1 Rep. 173.

Mr Sugden, who was also against the title, differed altogether in his argument from Mr Preston. He admitted that the power was extinguished by the settlement of 1811 ; but insisted upon the form of the pleadings,

(*a*) The report of this case, which the Master of the Rolls has allowed to be extracted from his MSS., is inserted here, as the judgment in it was the ground of the decision in Bickley *v.* Guest, which immediately follows.

[West *v.* Berney.]

that a good title could be made only for a certain term of 500 years, under which the plaintiffs claimed. He relied upon Albany's case, 1 Rep. 111, and Digges's case, 1 Rep. 173; and cited also Leigh *v.* Winter, Sir W. Jones, 411; Bird *v.* Christopher, Stiles, 389; Edwards *v.* Slater, Hardres, 410; King *v.* Melling, 1 Vent. 225; Tomlinson *v.* Dighton, 1 P. Wms, 149; Saville *v.* Blacket, 1 P. Wms, 777; Morse *v.* Falconer, 1 Anstr. 11, 3 Swanst. 429, n.

The Vice-Chancellor (sir John Leach).

In Albany's case, 1 Rep. 111, it was held, that the reserved power of the grantor may be extinguished by his release. He took in the settlement an estate for life.

In Digges's case, 1 Rep. 173, it was held, that the reserved power of the grantor, who took by the deed also an estate for life, being to be executed by deed indented and enrolled, was extinguished by his fine levied after a revocation, but before enrolment.

In Leigh *v.* Winter, sir W. Jones, 411, it was held that the grantor could release his reserved power of revocation. He took by the settlement an estate for life.

In Bird *v.* Christopher, Stiles, 389, it was held that, if A. enfeoff with power of revocation, and afterwards levy a fine, the power is extinguished.

Edwards v. Slater, Hardres, 410, was cited for the able reasoning of lord Hale upon the distinctions of powers; whose opinion seems to be, that where the party to execute the power has or had an estate in the land, it is not simply collateral; and whether it be appendant to his estate, as a leasing power, or unconnected with his particular estate, and therefore in gross, it may be destroyed by release, fine or feoffment.

In King *v.* Melling, 1 Vent. 225, it was held that a power in the devisee for life to jointure his wife was extinguished by a recovery.

In Tomlinson *v.* Dighton, 1 P. Wms, 149, it seems to be admitted, that where there is a devisee for life, with power to appoint to her children, the power would be extinguished by fine.

In Saville *v.* Blackett, 1 P. Wms, 777, it was held that a tenant for ninety-nine years, if he should so long live, extinguished his power to charge the estate with a sum of money by joining in a recovery and resettlement of the estate, because he would otherwise defeat his own grant.

In Morse *v.* Falkener, 1 Anstr. 11, 3 Swanst. 429, n., A. sold a copyhold estate to which he had no title. It afterwards descended upon him, and he died. On a bill by the purchaser against his heir, the court was of opinion that the purchaser would have had a personal equity, but doubted whether it could reach his heir.

Upon the authorities and principle my opinion is, that a power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by an act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.

It must be equally clear that it may be released, where it is for his own benefit, as a power to charge a sum of money for himself. In such case, his joining in a conveyance of the land clear of the charge, would be a release.

I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished. Bird *v.* Christopher.

It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate.

I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power.

Quære.—Could such a power in gross in a tenant for life be released? If he were grantor, it is decided by Albany's case, 1 Rep. 111, and Leigh *v.* Winter, sir W. Jones, 411, that it could be released; and I think it may equally be released, if he is grantee; because his release must be to him who takes subject to the power; and the exercise of the power would be inconsistent with the release, which is a species of conveyance affecting the land. *Sed quære.*

Mr Preston admits all this reasoning as applied to general powers, but disputes it as to powers to appoint to particular objects, as children. Here, he says, the power is not an interest in the appointor but in the appointee, and is therefore in the nature of a trust, which the trustee cannot release or extinguish.

It is not a trust, because the alleged *cestui que trust* cannot call for the execution of it. It may be exercised or not; and a dealing with the estate, inconsistent with the exercise of it, determines the option to exercise it. In King *v.* Melling, 1 Vent. 225, the power was a particular power.

But this reasoning would apply to a power simply collateral. The difference, however, is, that no act in the latter case can affect the land; whereas in the other, the interest of the person gives him the power to create an inconsistent estate in the land, though defeasable.

Mr Preston urged the relief given against frauds upon the power; as in the case of an appointment by a father substantially to himself. This, however, does not prove the existence of a trust. It proves only that a power given for a particular purpose shall not by circuity be exercised for a different purpose(*a*).

(*a*) Cunynghame *v.* Thurlow.

A fund being limited to a father for life, with remainder to his children in such shares as he should appoint, and in default of appointment, to the children equally, the father released the power as to a portion of the fund so as to vest a share of it in himself as executor of a deceased son, who, in default of appointment, took a vested interest; the court refused to order the transfer of this share to the father.

Feb. 15, 1832.

BY an indenture bearing date the 29th of April 1801, being a settlement made on the marriage of sir David Cunynghame, a sum of money was vested in trustees, upon certain trusts, for the husband and wife, and the survivor of them, and after the decease of the survivor, upon trust for all and every or such one or more child or children of the marriage, in such shares, &c. as the husband and wife during their joint lives, by any deed or deeds, with or without power of revocation, &c. should appoint, and, in default of and subject to such appointment as the survivor of them should, after the death of the other, by deed or writing, with or without power

[West *v.* Berney.]

It does not, upon the whole, appear to me to be a proper case to decide the general principle, that every power reserved by a grantor may be released or extinguished, although he reserved no other interest in the estate,—or the other principle, that every grantee for life with a power in gross may in like manner release or extinguish; although I was and am of opinion, that such two general principles are established. But I decide the case upon the ground that the settlement of 1811 was substantially and equitably an appointment by sir J. Berney in favour of his eldest son, and that the limitations in the settlement were to be considered as limitations made by him.

of revocation, &c. or by will appoint, &c., and, in default of and subject to such appointment, for the children of the marriage, in equal shares; such shares to be vested interests in sons on their attaining twenty-one, and in daughters, on their attaining that age or marriage.

There were seven children of the marriage; one of them died in infancy; Edward, the eldest, attained twenty-one, and died, having bequeathed the residue of his personal estate to his brother David, and appointed executors. Robert, another of the children, attained twenty-one, and died, having appointed his father his executor, and bequeathed to him all his personal estate and effects.

Various instruments were executed in execution of the power, which were from time to time revoked. Finally, by a deed poll dated the 30th of May 1831, sir D. Cunynghame, who had survived his wife, appointed four equal fifth parts of the fund to his two daughters and an infant son, in equal shares, with a proviso, that none of these three children should claim any part of the fifth share remaining unappointed, without bringing his or her appointed shares into hotchpot; and by the same instrument he released the unappointed share from his power of appointment.

The bill was filed by the father and all his surviving children, except the infant, together with the representatives of Edward, for the purpose of having the one-fifth of the fund, which remained unappointed, transferred to the father.

Mr Treslove and Mr Round, for the plaintiffs.

The effect of the appointment which has been made is to give four-fifths of the fund to three of the children, but in such a way as to exclude them from all possibility of interest in the remaining fifth part; for each of these three children takes under the deed of May 1831 four-fifteenths, and if they were to bring their appointed shares into hotchpot, each would have only one-sixth. That the power is extinguished by the release is established by Smith *v.* Death, 5 Madd. 371, and by the various cases cited in sir E. Sugden's treatise. The remaining one-fifth, therefore, must go, after the father's death, to the other three children as unappointed, that is, to David, the executor of Edward, and sir D. Cunynghame, as the executor of Robert. David and the executors of Edward are desirous that their shares of this one-fifth should be paid over to sir David Cunynghame, who, as executor of Robert, is entitled to the remaining one-third of it, and is tenant for life of the whole.

Mr Preston, for the trustees, denied that the power was extinguished by the release; and insisted, that, even if such a power could be extinguished, the donee of the power could not be allowed to release it so as to acquire an immediate benefit to himself; for here the power was released with no other view than that the father, as executor of the deceased son, who would take a vested interest in so much of the fund as was not appointed, might become entitled to that son's share.

The Vice-Chancellor (sir L. Shadwell) was of opinion that the power was extinguished by the release, but that the court ought not to give present effect to the release, so far as it operated to vest a share of the fund in the father, who was the donee of the power.

The order, therefore, was, that only two-thirds of the remaining one-fifth (being the shares which had become vested in Edward and David) should be paid to sir David Cunynghame; and the remaining one-third of the unappointed share was to continue in the hands of the trustees.

Bickley *v.* Guest.

Russell and Mylne, 440.

Semble. Where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levies a fine, the power will be extinguished.

By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of four hundred years, to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son and one or more younger child or children, who should live to attain his, her or their age or ages of twenty-one years, to raise such sum, not exceeding 200*l* in the whole, as the husband and wife should by any deed or writing appoint, or in default thereof, as the survivor should by deed or writing, or his or her last will or testament appoint; and in default of such appointment, or subject thereto, after the moneys so appointed should have been raised, and the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, and afterwards the husband levied a fine of the premises: Held, that the power was extinguished by the fine.

Rolls.—March 15, 23, 1831.

BY indentures of lease and release dated respectively the 11th and 12th days of April 1783, the release being made between Thomas Bumpas and William Guest, of the first part, John Guest the elder and Mary his wife, and John Guest, the son of John Guest the elder, of the second part, Rebecca Baylies, of the third part, and John Baylies and John Dolphin, of the fourth part, and being a settlement executed in contemplation of the marriage of John Guest the younger and Mary Baylies, John Guest the elder and Mary his wife, and John Guest the younger, did grant, bargain and sell the lands and tenements therein described, situate in the parish of Kingsnorton, to hold the same unto John Baylies and John Dolphin, and their heirs, from and after the solemnization of the intended marriage, to the use of John Guest the elder and Mary his wife for their lives, and the life of the longest liver of them; and after the decease of such longest liver, to the use of John Guest the younger during his life, and after his decease, to the use of Mary Baylies during her life; and, after the several deceases of the survivor of them, John Guest the younger and Mary Baylies, to the use of John Baylies and John Dolphin, their executors, administrators and assigns, for the term of 400 years, to commence from the day of the decease of the survivor of them, John Guest the younger and Mary Baylies, upon the trusts thereinafter mentioned; and, after the determination of the term, and in the meantime subject thereto, to the use of the heirs of the body of Mary Baylies by John Guest the younger lawfully to be begotten, with an ultimate remainder to the use of John Guest the younger, his heirs and assigns: and it was declared that the term of 400 years, thereinbefore limited to John Baylies and John Dolphin, their executors, administrators and assigns, was upon the express trust and condition that, in case there should be issue of Mary Baylies on her body by John Guest the younger lawfully begotten, a son and one or more younger child or children, on the body of Mary Baylies

by John Guest the younger also lawfully begotten, who shall live to marry, or attain his, her or their full age or ages of twenty-one years, then and in such case it should be lawful for John Baylies and John Dolphin, or the survivor of them, or the executors or administrators of such survivor, out of the rents, issues and profits of the said messuages, lands and premises, or by sale or mortgage thereof, or of a sufficient part thereof, for all or any part of the term, to levy and raise such sum and sums of money, not exceeding in the whole the sum of 200*l.*, as they, John Guest the younger and Mary Baylies, should by any deed or writing during their joint lives, by them to be sealed and delivered in the presence of two or more credible witnesses, or in default thereof, as the survivor of them, John Guest the younger and Mary Baylies, should, after the death of one them, by any deed or writing executed as aforesaid, or by his or her last will and testament in writing, to be attested by three or more credible witnesses, order, direct or appoint, and, in default of such order, direction or appointment, or subject thereto, after the moneys so appointed should be raised, and all costs and expenses of the trustees in and concerning the trusts, which the trustees were thereby also authorized to raise and pay to themselves, the term of 400 years, should cease or be assigned in trust to attend the inheritance of the premises.

In Easter term 1793, a fine was levied by John Guest the elder, and Mary his wife, which it was declared should enure to the uses of the settlement. The lands had previously stood limited to John Guest the elder for life, remainder to his wife Mary for life, remainder to the heirs of her body by John Guest the elder begotten, remainder to the heirs of John Guest the elder.

The marriage between John Guest the younger and Mary Baylies, was solemnized. There were five children of the marriage who survived both parents, and, at the death of the father, had all attained twenty-one years of age.

Mary Baylies, the wife, died in 1820, without having joined in any appointment of the 200*l.*; and in Michaelmas term 1823, John Guest the younger, conceiving himself to be tenant in tail, levied a fine with proclamations to the use of himself in fee.

John Guest the younger, by his will dated the 19th of January 1824, and attested by three witnesses, gave 100*l.* to his daughter Charlotte, 100*l.* to his daughter Mary, and 200*l.* to his daughter Elizabeth; all which legacies he charged on his freehold lands in the parish of Kingsnorton, and subject thereto he devised those lands to his eldest son John in fee; and he directed that these legacies should be accepted by his daughters in full compensation for any sum of money they might be entitled to under the marriage settlement, or by virtue of the term of 400 years therein created for raising portions for his younger or other children.

By a codicil he increased the amount of the sum given to Mary and Elizabeth, and expressly exempted his personal estates from the legacies charged on his lands in Kingsnorton.

The testator had no lands in Kingsnorton except those which were comprised in the settlement. He died in March 1825. His eldest son then took possession of the lands in Kingsnorton as heir of the body of his mother, and refused to pay the legacies, inasmuch as his father, being only tenant for life, had no power so to charge the inheritance.

The daughters then insisted that the will amounted to an execution of the power, and was in effect an appointment of the 200*l.* among them in

the proportions of their respective legacies; and, in January 1828, the present bill was filed to have the 200*l.* with interest, raised by virtue of the term of 400 years.

In the argument there was considerable discussion on various subordinate points; as, whether the entry of the tenant in tail, revesting his own estate, had any and what effect on the power; whether the term ceased by virtue of the proviso; whether the entry of the tenant in tail revested the term; whether time could run upon the fine, pending the suit in equity; whether it was now too late for the termor to enter. But the material question, and that on which the decision ultimately turned, was, whether the power was extinguished by the fine levied in Michaelmas 1823.

Mr Pemberton and Mr Rolfe, for the plaintiff.

Mr Richards, for a defendant in the same interest.

There can be no doubt that the testator meant to execute his power. He possessed no property in Kingsnorton, except what was subject to the power; the sums which he has disposed of are expressly directed to be raised out of that estate and by means of the term; and though larger than the power warranted, the appointment is void only for the excess, and to the extent of 200*l.* is a good execution. Parker *v.* Parker, Gilb. Equ. R. 168. In creating these charges, the purpose of making provision for his younger children, as the power enabled him to do, was distinctly in the testator's contemplation; and the court, in construing an instrument which provides for the younger branches of a family, will restrict and cut down general expressions, in order to uphold it as a valid execution. Bristow *v.* Warde, 2 Ves. Jun. 336; Hinchinbroke *v.* Seymour, 1 Bro. C. C. 395. A power to appoint in favour of younger children is regarded as a species of trust imposing a moral duty on the parent, who is considered rather as a trustee for the exercise of the power for their benefit, than as having a discretion whether he shall exercise it or not; and in default of an appointment, the children take. If a will be executed by the donee of a power in favour of such objects, the will is referred to the power, without which it could have no operation, and is treated as an effectual appointment. Bristow *v.* Warde, Brown *v.* Higgs, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561: Madoc *v.* Jackson, 2 B. C. C. 588. The court adopts the same principle as in trusts, and will not permit negligence or mistake in the parent, who is the trustee, to disappoint the interests of those for whose benefit the power was bestowed.

That would of itself be a sufficient answer to any objection founded on the supposed effect of the fine; for the fine was unquestionably levied by the testator under the erroneous notion that he was tenant in tail; and equity would relieve from the consequences of the error. But whatever force such an objection might have had, if this were a mere general power to charge a sum of money, the fine cannot operate to destroy the power, where, as in the present case, a term, upon which the power attaches, has been created for the express purpose of bearing the charge. That term is now actually subsisting; and there is on the part of the testator, an explicit declaration of his will that it should be resorted to, in order to effectuate his purpose. In Cross *v.* Hudson, 3 Bro. C. C. 31 (the converse of this case), it was held, that where a power was defeated by the happening of a contingency subsequently to the execution of the will, the interest of the devisor, though at the date of the will contingent only, should come

in aid of the disposition, and enure to support the appointment. Dobbins *v.* Bowman, 3 Atk. 408, depended upon a similar principle. If, instead of being a joint power with remainder to the survivor, this power had been limited first to the husband and then to the wife, and if the husband, after making an appointment by will, had acquired the fee and died, could it be for a moment contended that it was still open to the wife to execute the power?

Mr Tinney and Mr Jeremy, contrà.

By the fine levied after the death of the wife, a tortious fee-simple was gained; all the limitations existing under the settlement were displaced and devested(*a*); and the power, which was annexed to the husband's life interest, was of course destroyed. It is incorrect to say that the term is still subsisting: in default of appointment (and here we contend that there could be no appointment after Michaelmas 1823, and that there has been none) it was to cease absolutely. This is a mere general power for raising a sum of money, not confined to children, or specifying any purposes, but to be exercised at the discretion of the husband and wife, and in favour of such objects as they or the survivor should think fit to select. If it had been otherwise, however, and if children had been designated as the objects, still it is expressly provided that, in the event of the power not being exercised, the legal estate on which it was to operate shall determine. In Bristow *v.* Warde, which was a case on marriage articles, there was an ultimate limitation to the children in default of appointment. Here the power is created not by articles, but by a deed, and the property, failing an appointment, is directed to go to the eldest son. Notwithstanding these special circumstances, even Bristow and Warde has been questioned; and sir Edward Sugden, in his Treatise on Powers(*b*), has observed that it must not be considered as establishing a general rule.

When the testator made his will, devising several sums of money to his different children, he had no intention to execute the power. On the contrary, his intention was that the charges should be raised out of the fee-simple, which, he supposed, he had acquired by the fine. There is no direction to raise the money for the benefit of the younger children as such. The sums, which they were to receive respectively, varied considerably in amount, in the whole greatly exceeding the extent of the power; and there is neither principle nor authority upon which, if this will were held to be a good appointment of the 200*l.*, their several shares could be apportioned. The natural inference from all these circumstances is, that the devise was not intended, and cannot be considered, to be an execution of the power; and then, as the term is gone, in the event of the party failing to appoint, it is impossible that an entry should revive it. The effect of an entry avoiding the fine could only be to revest the ulterior estates, not those which were already at an end(*c*). If, indeed, this were a power simply collateral, no act of the donee could effectually bar it; but the power is coupled with an interest; and it has been determined in Smith *v.* Death, 5 Madd. 371, in conformity with the previous decision in West *v.* Berney(*d*), that the power of a father, who is himself tenant

(*a*) 1 Preston on Conveyancing, 207, where the authorities are collected. 1 Cruise on Fines and Recoveries, 343.

(*b*) Sugden on Powers, p. 463, n., 4th ed.

(*c*) 1 Preston on Conveyancing, 247.

(*d*) Referred to in Sugden on Powers, p. 80, 4th edit., and reported ante, p. 501.

for life, to appoint in favour of children may be destroyed by the acts of the donee. Smith *v.* Death was followed by sir T. Plumer in Horner *v.* Swann, 1 Turn. & Russ. The authorities cited from Atkyns and Brown have no bearing on the question, inasmuch as they apply only to cases in which the testator had a power of appointment, subsisting at the time of the execution ; whereas here it was absolutely gone.

Mr Whitmarsh, for the trustees.

Mr Pemberton, in reply. The term has not ceased, even granting that the power was never exercised. Failing any appointment, the trusts are to determine ; but the term itself continues to subsist, it being kept alive for the benefit of the trustees to reimburse them for the costs they may have incurred in performing their office ; and subject to that charge, it is directed to be assigned. It is impossible to doubt the testator's intention; for he expressly declares that the larger sums given by his will shall be taken in satisfaction of the smaller sums, which, under the marriage settlement containing the power, he might have appointed to his children. The father died in March 1825, and in January 1828 the present suit was instituted. Pincke *v.* Thornycroft, 1 Bro. C. C. 289, 4 B. P. C. 92, Toml. ed., has decided that the filing of a bill is in some cases equivalent to an entry ; or, at all events, that the court will not allow a fine to be set up as a bar, especially where the non-claim has run during the pendency of the suit. Baker *v.* Pritchard, 2 Atk. 387 ; Dormer *v.* Fortescue, 2 Atk. 282.

This cannot be considered as a general power. It was a power reserved to the husband and wife by the contract of marriage ; and was made to depend on the contingency of there being issue of the marriage other than a son, and of such issue attaining an age which would make a provision for them necessary. It has never been determined that such a power is extinguished by a fine(*a*). Smith *v.* Death proceeded on the ground that the donee of the power had determined his option, by dealing with the estate in such a manner as gave to other persons interests inconsistent with the exercise of the power.

March 23.—The Master of the Rolls stated, that in this case a tenant for life, with a power to charge the estate after his death for the benefit of his children, levied a fine with proclamations, and afterwards made his will in execution of his power ; and that the material question in the cause was, whether the power was destroyed by the fine ?

His honour then read a very full note of the case of West *v.* Berney, in which all the leading authorities on the point were referred to, and commented on by him, and in which he had expressed a decided opinion, although ultimately the case went off upon another ground, that such a power would be destroyed by a fine ; and he stated that, upon reconsideration, he continued of the same opinion.

The bill was dismissed, without costs.

(*a*) See Jesson *v.* Wright, 2 Bligh, 8.

Comber *v.* Graham.

Russell and Mylne, 450.

Where a sum of money is bequeathed in terms that give an absolute interest to the legatee, the mere addition by subsequent words of a power to dispose of the legacy by will during the continuance of a prior life-interest in the money, does not by implication exclude the right of the legatee to dispose of it by deed *inter vivos* during the same period.

Rolls.—March 18, 1830.

THE will of A. D. Bradshaw, after giving to his mother and his wife a life-interest in all his effects, with the remainder, after the death of either, to the survivor for her life, continued as follows: "after whose decease I give and bequeath the principal from which such interest may have arisen to such child or children as I may have, in equal proportions, whom all failing, after the death of my said mother and wife, I give and bequeath the principal from which such interest will have arisen in the following manner; first, I reckon my property at present not much under 2000*l.*, and as I have been honoured with lord Adam Gordon's patronage during the period of my accumulating it, I therefore give and bequeath to the right hon. lord A. Gordon the sum of 2000*l.*; but as this would be an empty compliment, considering the possibility of either my wife or myself surviving him, I therefore hereby confirm the disposal he may make by will of the above sum of 2000*l.*, the same as if he had succeeded to it during his life, and after the decease of my mother and wife, and failing of children as aforesaid; provided he does not bequeath or leave it, or any of it, to my uncle sir A. S., or to either of the brothers of my wife, or in such manner that the descendants of any of the said excepted persons shall become possessed of it."

The testator died in 1781, leaving no issue. In 1787 lord A. Gordon, in the lifetime of the testator's mother and widow, assigned his reversionary legacy of 2000*l.* to a person whose interest was now represented by the plaintiff. The only question was, whether the assignment, being made during the lives of the tenants for life, was a valid disposition of the legacy?

Mr John Wilson, for the plaintiff, contended that the sum bequeathed to lord A. Gordon was effectually passed by his assignment. The language of the will was founded on a mistaken idea that, during the existence of a prior life-interest in the legacy, it could not be effectually aliened by the legatee; and the object of the testator, who had previously made the bequest in words which of themselves were sufficient to confer an absolute interest, was simply to enlarge the gift, by adding to it (what he did not know would be implied), a power of testamentary disposition. Robinson *v.* Dusgate, 2 Vern. 181: Maskelyne *v.* Maskelyne, Amb. 750; Hales *v.* Margerum, 3 Ves. 299; Nannock *v.* Horton, 7 Ves. 391; Hixon *v.* Oliver, 13 Ves. 108. The subsequent clause, excluding certain specified individuals from the benefit of that power, was a valid condition(*a*),

(*a*) Litt. § 361; Large's case, 2 Leon. 82, 3 Leon. 182.

and by no means incompatible with a wish on the part of the testator that the legatee should enjoy a right of alienation in other respects unlimited.

Mr Bickersteth and Mr Le Marchant, for the personal representatives of the testator, insisted that the will was obviously framed upon the notion that lord A. Gordon would take no more than a contingent interest, unless he survived the mother and the widow; and as the testator, when his purpose was to enhance the value of the gift by enabling the legatee to dispose of his interest during the supposed contingency, only gave him a power of disposition by will, and that too a power limited in its objects, as well as in the manner of its exercise, the implication was irresistible that he meant to bestow no larger power than was conferred by express words. A contrary construction was directly opposed to the intention, and would render the cautious provisions of the will not merely superfluous, but nugatory. What availed the prohibition against a bequest to any of the excepted persons, if the legatee were to be at liberty, notwithstanding, to convey his interest by a deed? Mackell *v.* Winter, 3 Ves. 236, 536, was referred to.

Mr Barber, for other parties.

The Master of the Rolls was of opinion, that under the first words of the bequest lord A. Gordon took an absolute interest in the legacy; and that, inasmuch as the subsequent clause, empowering him to dispose of it by will, was evidently intended to enlarge instead of abridging the extent of the interest previously given, lord A. Gordon was not thereby precluded from assigning his legacy by a deed *inter vivos*, executed while the mother and widow of the testator were still living.

Campbell *v.* Graham.

Russell and Mylne, 453.

A testator, domiciled in Jamaica, gave legacies in Jamaica currency to J. C., H. C., and M. C., persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds which the will specified. At his death, which happened in Scotland in 1790, no such bonds were to be found; but J. C. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, and which, a year after the testator's death, including interest, was equal to the amount of the penalties. In 1794, actions were brought in Jamaica upon those bonds, by the testator's personal representative there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy execution upon the judgments, and they remained unsatisfied. About the time of the testator's death the legatees came to England, and never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818 H. C. and M. C. assigned their respective legacies to the plaintiff, who was the personal representative of J. C., the other legatee; and he, in the year 1821, when administration was for the first time taken out to the testator's estate in England, filed the bill for the purpose of enforcing payment:

Held, that the legacies were demonstrative only, and were not to be considered as having been adeemed:

That as they were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate, at the time of payment:

That J. C. must be considered as having been paid his legacy by retaining the amount out of the

bond debts, and that that amount was to be deducted, first from the interest, and then *pro tanto* from the principal due from him upon the bonds, as at the end of a year after the death of the testator; and interest was then to be calculated on the balance till the amount equalled the sum for which the judgments were recovered, and no further:

That such retainer and set-off could not be allowed in respect of the legacies which the plaintiff claimed only as assignee: and,

That the assigned legacies, under the circumstances, and after the lapse of twenty-seven years without demand, ought to be presumed to have been satisfied.

Rolls.—March 4, 5, 8, 1830. L. C. July 15, 16, Aug. 23, 1831.

WILLIAM GRAHAM, who, at the date of his will and codicil, and for many years previously, was domiciled in the island of Jamaica, and possessed of considerable property there, by will dated the 17th of June 1768, bequeathed to John Campbell, of New Hope in Jamaica, the sum of 1000*l.* Jamaica currency; and to Henrietta Campbell and Margaret Campbell (afterwards Hay) the sum of 500*l.* each, like currency; and he desired that these legacies should be paid out of the money due to him on bonds from the said John Campbell and his mother. The testator afterwards, by a codicil dated the 13th of June 1772, gave to the same John Campbell 1000*l.* Jamaica currency, over and above his former legacy.

The testator died in Scotland on the 1st of December 1790. John Campbell, Henrietta Campbell and Margaret Campbell, the legatees, were brother and sisters; they were all natives of Jamaica, and were domiciled there at the time when the testator made his will and codicil. About the year 1790, John Campbell quitted Jamaica, and neither he nor Margaret Campbell, who had previously left the island, ever returned to it. None of the executors proved the will; but in August 1791 administration, with the will and codicil annexed, was duly granted in Jamaica to James Graham, as the attorney in that island of the testator's next of kin: and afterwards, letters of administration *de bonis non* of the testator's personal estate in Jamaica were, in the years 1793, 1794 and 1818, successively granted to persons therein described as the attorneys in Jamaica of the testator's next of kin residing in Great Britain. There was no personal representative of the testator in this country till the month of November 1821, when the defendant, William Graham, took out administration to the personal estate and effects in England. John Campbell, the legatee, died in the year 1801, and in October 1803 administration of his personal estate, with his will annexed, was granted in Jamaica to the plaintiff, John Graham Campbell, his son, who, after several intermediate representations taken out here, obtained, in May 1810, administration *de bonis non* of his father's personal estate from the prerogative court of Canterbury.

By an indenture of the 14th of December 1818, made between the said Henrietta Campbell and Dame Margaret Hay, widow, formerly Margaret Campbell, of the one part, and the plaintiff, J. G. Campbell, of the other part, after reciting that the said two legacies of 500*l.* and 500*l.* were then due to Henrietta Campbell and Margaret Hay respectively, they, in consideration of 25*l.* to each of them paid by the plaintiff, J. G. Campbell, and also in consideration of natural love and affection to him as their nephew, assigned to him their said several legacies for his own use, together with all interest accrued or that might thereafter accrue due thereupon.

The bill, which was filed in the year 1821 by John G. Campbell against William Graham as the personal representative of the testator, charged that assets had come to the defendant's hands, over and above the judg-

ments afterwards mentioned, sufficient to satisfy the testator's debts and legacies, and it prayed an account and payment of the sums bequeathed to John Campbell and his sisters. The answer merely stated the defendant's belief that the testator's assets, including therein the sums due in respect of those judgments, were more than sufficient to satisfy all the outstanding demands against the testator's estate.

Under an order in the cause directing the Master to inquire and report whether the said legacies of 1000*l.*, 1000*l.*, 500*l.* and 500*l.*, or any and what parts thereof respectively were then due and payable, and if necessary to take an account of what was due for principal and interest in respect of them, with liberty to state any special circumstances, the facts above detailed were found by the report.

The Master also found that the value of the legacies, all of which, together with the interest, he certified to be still unpaid, ought to be ascertained, not according to the then present current rate of exchange, which was twenty-two and a half per cent above par, but according to the established par of exchange between Jamaica and British currency, that being in the proportion of 140*l.* currency to 100*l.* sterling; and that there was, therefore, due to the plaintiff on account of the four legacies in question, including interest thereon at four per cent from the end of a year after the testator's death, the sum of 5243*l.* 15*s.* 11*d.* sterling.

It did not appear whether at the date of the will any money was due to the testator on bonds from John Campbell and his mother; and the report took no notice of the existence of any such bonds. But the Master stated that in the months of October 1773 and March 1774 respectively, John Campbell himself executed to the testator two several bonds with penalties of 5272*l.* and 1400*l.* to secure the repayment of 2632*l.* and 700*l.* sterling with interest; that neither of these sums had ever been paid; and that soon after the testator's death, his personal representative commenced actions upon the bonds in the supreme court of Jamaica against John Campbell, and on the 2d of June 1794 recovered judgments for the full penalties and the costs, amounting together to the sum of 6703*l.* 5*s.* sterling.

The Master found that under a decree made in a creditor's suit against the personal representatives of the said John Campbell, deceased, and in which the defendant, William Graham, was plaintiff, and the plaintiff, John G. Campbell and others were defendants, the sum of 6703*l.* 5*s.* sterling was reported to be then due to Graham in respect of the aforesaid two judgments; that Graham excepted to the report, and in addition to that sum, claimed interest thereupon at six per cent from the 2d of June 1794, but that the exception was overruled; that other accounts and inquiries were then directed, and some further proceedings were had, but that no subsequent report was ever made in that cause.

The Master further found that, by an indenture dated the 20th of August 1828, made between the plaintiff, J. G. Campbell and the defendant William Graham, for the compromise of the cause of Graham *v.* Campbell, the said J. G. Campbell agreed to take upon himself the payment of the sum of 6703*l.* 5*s.*, together with the costs of that suit, after deducting what, if any thing, should be found due to him in the present cause of Campbell *v.* Graham, in respect of the said several legacies and of the costs.

The report also set forth the affidavit of the defendant William Graham, in which he stated, that he never heard of any claim or demand in respect of the said legacies till the year 1817, although in 1794 the said bonds had

been put in suit in Jamaica, and judgments had been there obtained upon them; but that such claim was first brought forward, on the plaintiff being pressed for the settlement of the bond debts.

The Master reported that it did not appear to him that the legacies were to be considered as having been adeemed or satisfied; or that no interest was due upon them; or that the principal thereof should be set off and deducted from the amount due to the defendant upon the said bonds and judgments, as on the first of December 1791, one year after the testator's death, and the interest be thereafter calculated upon the amount which would then remain due upon the said bonds and judgments, until the same should amount to the said sum of 6703*l.* 5*s.*; or that although interest was calculated upon the said legacies, it should in like manner be calculated upon the said sum of 6703*l.* 5*s.*

To this report the defendant took, among others, the following exceptions:

I. Because the Master had certified that it did not appear to him that the legacies were to be considered as having been adeemed, or paid and satisfied.

II. Because he had not certified that the principal of the legacies of 1000*l.* and 1000*l.* should be set off and deducted from the amount due to the defendant upon the bonds and judgments as on the 1st of December 1791; and that interest should be thereafter calculated on the amount remaining due on the said bonds and judgments after such deduction, until the same should amount to 6703*l.* 5*s.*

III. Because he had not certified that the principal of the legacies of 500*l.* and 500*l.* should in like manner be deducted from the amount due to the defendant, as on the 1st of December 1791, &c. (as in the foregoing exception).

IV. Because he had calculated the value of the legacies, and of the interest thereon, not at the rate of twenty-two and a half per cent premium on the sterling value of the bills of exchange drawn in Jamaica upon England, but according to the ordinary par or rate of exchange between the two countries.

Mr Pemberton and Mr Simpkinson, for the objections.

The long interval of time that has elapsed between the death of the testator and the filing of the bill, raises an irresistible presumption that all these legacies have been already satisfied. The legatees were nearly related to the testator: they resided in the same country with him, and they could not possibly be ignorant of their rights under his will. The reasonable inference is, that they either received payment of their several legacies, from some of the various individuals who successively administered to the estate in the West Indies, or that they intended and consented to give up their claims. But whatever be the fact, it is a sufficient answer to the plaintiff to say, that seven-and-twenty years have been suffered to pass, without a demand made, or any circumstance shown to account for the delay. Pickering *v.* Stamford, 2 Ves. Jun. 272, 581, 4 Bro. C. C. 214; Jones *v.* Tuberville, 2 Ves. Jun. 11, 4 Bro. C. C. 115; Roper on Legacies, Vol. I. p. 791.

The legacies given by the will are specific. They were payable out of certain moneys then due to the testator upon the bonds of John Campbell and his mother. The report is altogether silent as to those bonds; and it does not appear that when the testator died, any such bonds were out-

standing. The presumption is, that they had been paid off: and the bequests charged upon them, therefore, must be considered as adeemed.

If any of these legacies, however, can now be regarded as existing demands, those to John Campbell ought certainly to be set off *pro tanto* against the sums due from Campbell upon the bonds, as at the end of a year after the testator's death. Those bond debts were assets in the debtor's hands applicable to the payment of his legacies, and more than adequate for that purpose; and he must, therefore, be taken to have so applied them. Jeffs *v.* Wood, 2 P. Wms. 128; Ranking *v.* Barnard, 5 Mad. 32; Ex parte O'Ferrall, 1 G. & J. 347. In like manner the 500*l.* legacies subsequently assigned to the plaintiff ought to be set off and deducted from the amount, which, as the personal representative of John Campbell, he then owed to the testator's estate.

The principle upon which the Master has proceeded in taking the account works gross injustice. He has not computed interest upon the bond debts beyond the penalties, and as they carried six per cent interest, they must have reached the amount of the penalties before the testator's death, or, at all events, before the judgments were recovered in the actions; whereas in calculating what is due upon the legacies, he has allowed interest at four per cent from a year after the testator's death till the present time, a period of nearly forty years. There is no inflexible and peremptory rule in equity, that the moment the sum secured by a bond amounts to the penalty, interest shall cease to run. Lord Eldon, in Grant *v.* Grant, 3 Russ. 598, expressly repudiated that doctrine. The manifest unfairness of applying the ordinary rule to a case circumstanced like the present, justifies the court in departing from it, and allowing interest beyond the penalty. Clarke *v.* Seton, 6 Ves. 411; Tew *v.* Winterton, 3 Bro. C. C. 489, 1 Ves. Jun. 451. At any rate, if the sum due in respect of the legacies be retained and set off *pro tanto* against the bond debts, assuming that, at the time when the legacies became payable, those debts equalled the amount of the penalties, interest must be suffered to run upon the balance till the sum again reaches that point.

The effect of computing the value of the legacies in Jamaica currency according to the nominal, and not to the real par of exchange, is to impose upon the testator's estate an additional charge of twenty-two and a half per cent, the *extra* cost of remitting the amount to England.

The Master of the Rolls said, that upon several of the points raised he could not entertain a doubt. The sums bequeathed by the will were not specific but demonstrative legacies, and could not be considered as adeemed. The assignee of a legacy continued, until it was paid, to stand precisely in the same situation as the assignor had done; and in that respect the case of Jeffs *v.* Wood had no application. The argument upon the rate of exchange was wholly beside the question. The legacies were to be paid out of assets in England, where the defendant had taken out administration to the estate, so that there could be no expense of remittance. The third and fourth exceptions must therefore be overruled.

Mr Tinney, Mr Rennalls and Mr Rolfe, for the plaintiff, upon the first and second exceptions.

The circumstances sufficiently explain the conduct of the legatees in so long neglecting to claim their legacies. The parties were all resident in this country at the time when the testator died, and although a regular

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series of administrations was taken out to his estate in the West Indies, he had no personal representative in England till the year 1821; nor were there any assets out of which the judgment could be satisfied. John Campbell could not take a single step in compelling payment of his legacies without being himself called upon to discharge the larger sum due on his bonds to the estate of the deceased. It was not his interest to stir in the matter, and, consequently, the presumption, which is founded on its being for the party's own benefit to enforce payment, entirely fails. The objection, however, if it could be maintained, comes with a bad grace from one who himself seeks to set up a counter-demand, the origin of which is carried twenty years farther back. As to the legacies assigned to the plaintiff by his aunts, it is not very surprising that those ladies should be unwilling to resort to legal proceedings against a relative for sums not exceeding 350*l.* sterling to each of them, especially as such proceedings, in order to be effectual, must have been carried on in a foreign court, by some person holding a power of attorney to act on their behalf.

The bond debts must have reached the full amount of the penalties at the time of the testator's death in December 1790, or at the end of a year afterwards, certainly long before the judgments were recovered in the actions. No authority can be produced to warrant the court in implying a retainer of the kind now contended for. In the cases referred to, the executor insisting upon the set-off, always admitted assets. That was done expressly in Jeffs *v.* Wood, 2 P. Wms. 128. Unless, indeed, there be an admission of assets, or an assent signified by the personal representative, a legatee can have no right to claim satisfaction of his legacy by way of retainer, till all the debts are discharged and the fund is clear. Here, so far from there being any such assent or admission, the administrator in Jamaica brought actions and recovered judgments for the full penalties; a circumstance proving, if evidence were necessary, that no payments had ever been made in respect of the bond debts. When those debts reached the amount of the penalties, interest from that moment ceased to run upon them; and having once stopped, it could not revive, when the deduction caused by a set-off implied at the end of a year after the testator's death, reduced the total sum due below that amount.

The Master of the Rolls. The single question is, whether the delay that has taken place here, is or is not satisfactorily explained; and I am of opinion, that as far as relates to the legacies given to John Campbell, that delay is satisfactorily explained. It never was Campbell's interest to settle the account with the representatives of Graham; because, upon such account, a considerable balance would have been found against him; and if he had called upon them for satisfaction of his legacy, he must necessarily have come to a settlement of the general account and have paid the balance. The circumstances referred to in the argument in no way affect this reasoning. In the year 1794, four years after the testator's death, his personal representative in Jamaica brought actions against Campbell for a large sum alleged to be due upon two bonds, and recovered judgments in respect of those bonds. It is said that Campbell's attention must have been then called to the subject of his counter-demand, and that, though he could not have claimed to set it off in the actions, he might still have availed himself of the same benefit, by a bill in equity filed in Jamaica. And it is no doubt true that he might have so done; but he must in that case have submitted to pay the balance due from him on the

account: and it is plain, that, from the year 1794 down till the present time, the judgments recovered against Campbell have been wholly unavailable to the testator's estate.

There is much greater difficulty with respect to the legacies of 500*l.* given to Henrietta Campbell and Margaret Hay. The only reason assigned why these legacies were not sooner demanded, is, that the legatees left the island of Jamaica, where the assets of Graham were to be administered, and came to England with their brother; a fact which the Master has found with respect to one of the sisters, and which, as they both formed part of John Campbell's family, may not unnaturally be presumed with respect to the other. Another reason, which was not suggested at the bar, seems very possible, namely, that there were not assets forthcoming. It was at first alleged, that the answer of the defendant contained an unqualified admission of assets. On examination, however, the passage will be found to amount to nothing more than an admission, that if the representatives of Graham should recover the sums due on bond from the representatives of Campbell, there would then be sufficient funds to satisfy the legacies. Upon these grounds I am disposed to think that the Master, in allowing the claim for these legacies, has followed the safer course; and the exception must, therefore, be overruled.

Upon the question raised by the other exception, I think I must assume (what indeed appears to be conceded), that, at the time of the testator's death, or at the end of a year afterwards, when the right to receive the legacies accrued, the principal and interest due upon the bonds amounted to the penalties; and, assuming that to be the fact, my opinion is, that the Master's calculation cannot stand, but that the amount of the two sums bequeathed to John Campbell must be considered as giving him a right of retainer at the end of one year after the death of the testator, and that the debt due from him must be computed upon the principle of such retainer. Whether or not the debt is then to carry interest till it again reaches the amount of the penalty, is a question which I should wish to have farther inquired into before deciding the point.

March 8.—The point reserved at the hearing was again argued at some length. Clarke *v.* Seton, 6 Ves. 411, and Doran *v.* O'Reilly, 3 Price, 250(*a*), were the only cases referred to.

The Master of the Rolls. It does not appear to me, that the cases proceed upon any other principle than that the Master is not to compute interest beyond the amount of the penalty.

I am of opinion, that when these legacies became payable, which was at the end of one year after the death of the testator, they are to be considered as paid, that is to say, they are claims which the debtor then had on the creditor, and which, therefore, he was entitled to set off at that time. I am also of opinion that the retainer operates in the same way as if payment had been then made, and that the obligee of the bonds had a right to apply that payment, first in discharge of the interest, and then *pro tanto* in reduction of the principal.

Although the judgments recovered in the actions brought in 1794 were

(*a*) Most of the cases on the subject are collected in Mr Raithby's note to Hale *v.* Thomas, 1 Vern. 350. See also Crispe *v.* Blake, 1 Ch. C. 23, Ca. T. Finch, 89; Maclure *v.* Dunkin, 1 East, 436.

taken for the full penalties, they formed, in truth, a security only for the amount of the sums which might then be due upon the bonds; and the principal sums so remaining due would carry interest, until the amount of that interest, together with the principal, was equal to the penalties, a point which was expressly decided in the case of Clarke *v.* Seton.

By the decree it was declared, that "the amount of the two several legacies of 1000*l.* and 1000*l.* Jamaica currency, certified to be due to the plaintiff John G. Campbell, as administrator of John Campbell deceased, is to be considered as giving to the legatee a right of retainer as on the 1st of December 1791, being the end of one year after the death of William Graham, the testator, to the amount of the said two legacies, out of the debt due by the said John Campbell, deceased, to the said William Graham, deceased, upon the bonds on which the judgments in the pleadings mentioned were obtained; and to be considered as applied first in payment of the interest, and the remainder, if any, in payment of the principal of the said debt; and that the account between the parties is to be computed upon the principle of such retainer; and that it be referred back to the Master to inquire and ascertain what was due upon the said judgments on the 2d day of June 1794, when they were obtained, having regard to the declaration hereinbefore contained as to the right of retainer in respect to the said two legacies; and the said Master is to compute interest on what he shall so find to be due on the said 2d day of June 1794 upon the said judgments, from the said 2d day of June 1794, until the amount due on the said judgments, together with the costs therein mentioned, shall have reached the sum of 6703*l.* 5*s.* sterling, being the amount of the penalties of the said bonds, and of the said costs," &c.

July 15, 16, 1831.—Both parties presented petitions of appeal.

On the rehearing of the exceptions before the Lord Chancellor three questions only were argued: first, with respect to the set-off; secondly, upon the effect of laches in barring the claim of the legatees; and, thirdly, as to the correctness of the Master's calculation of the value of the legacies.

Mr Tinney, Mr Rennalls and Mr Rolfe, for the plaintiffs.

The Master was right in computing what was due in respect of J. G. Campbell's legacy at the time when the bill was filed, and deducting the amount from the judgment debt. That the one claim carried interest at four per cent, while the other carried no interest, was an accident, which here is favourable to the legatee: but the advantage might have been the other way. Suppose, for example, the debt, instead of being secured by a judgment, had been due upon a bond bearing interest at five per cent, could the legatee have then insisted as a matter of course on having his legacy set off, as at the date of the testator's death, or at the end of a year afterwards, against the money due upon the bond? The doctrine has never gone to that extent. Though recognized in equity long before the legislature ventured to make it available at law, the application of set-off has been always founded on mutual dealings and on some evidence, however slight, of the assent or contract of the parties. Curson *v.* African Company, 1 Vern. 121(*a*); Hawkins *v.* Freeman, 8 Vin. Ab. 560; Carr *v.* Taylor, 10 Ves. 574; Ex parte O'Ferrall, 1 G. & J. 347. In Jeffs *v.*

(*a*) The principal cases on the subject are collected in the note.

Wood, 2 P. Wms, 128, which was much relied upon in the court below, the circumstances are incorrectly stated: the judgment really turned upon an agreement, and the executor besides had admitted assets. But, so far as it seems an authority for applying the doctrine generally, wherever there are opposite debts, without proof of understanding or intent, it is contradicted by the later cases of Pegg *v.* Green, Mos. 185, and Whitaker *v.* Rush, Amb. 407. A legatee never can be permitted to pay himself by retaining the value of his legacy out of a debt, unless the personal representative has given his assent, or has distinctly admitted assets. Till then there are no mutual demands; for the legatee is a mere volunteer, and the executor who takes upon himself to authorize such a retainer before all the testator's debts are satisfied, incurs the hazard of committing a *devastavit*. It is an option, therefore, which can belong only to the personal representative, and his right must stand upon the same footing as that of any other person who unites the character of debtor and creditor of another. The party, who would have the benefit, must declare his election; he must either adopt his right at the moment when the mutual claims arise, or he is presumed to reject it. Here the administrator rejected it, for he insisted on full satisfaction of the debt, and, in the actions brought upon the bonds, judgments were recovered for the whole amount of the penalties. It is impossible, upon principle, that set-off should be applied by relation to any antecedent period, unless there has been some intimation of intention; nor can any precedent be produced for giving it a retrospective operation. It can only take effect from the time when the plaintiff by filing his bill asserted the existence of a cross demand. Why should the end of a year after the testator's death be fixed upon as the time for striking the balance between the counter-claims rather than any other period?

The administrator, by his answer to the bill, did not set up time as a defence, but resisted the payment on quite a different ground,—that the legacies were not general legacies, but specific, and that no bonds could be found to satisfy them. The denial of the validity of a claim is a circumstance that rebuts the presumption of satisfaction raised by the lapse of time. Reeves *v.* Brymer, 4 Ves. 692, 6 Ves. 519. No administration was taken out in England till 1821, and till then, consequently, there was no person upon whom the demand could be made. When the statute of limitations has been set up against a claim, it has been decided that no cause of action accrued, until there was an administration to the estate of a party in whose right the action was brought. Murray *v.* The East India Company, 5 B. & A. 204. The same rule must apply where the party against whose estate a demand is made, has been unrepresented for a series of years. Here there was no fund out of which the legacies could be paid; for the assets were not collected, and of course could not be distributed till the year 1821. It is true that length of time will raise a presumption of the payment of legacies: thus in Pickering *v.* Stamford, 2 Ves. Jun. 272, 581, it was said that had that been the case of a legacy, thirty-five years would have been a bar; and in Jones *v.* Turberville, 2 Ves. Jun. 11, a legacy was presumed to be satisfied after forty years. Hercy *v.* Dinwoody, 2 Ves. Jun. 87, 4 Bro. C. C. 257. In fact, a much less time would be sufficient to raise the presumption in the absence of all circumstances to rebut it; for as a legacy is in the nature of a simple contract debt, six years, and not twenty, would be the period of limitation against the demand of the legatee. But in this case there are abundant circum

stances to repel the presumption of payment; for besides the impossibility of making the demand while the estate of the testator was not administered to, the absence of a creditor in a foreign country is of itself sufficient to prevent the statute of limitations from running, and by analogy from raising a presumption of payment as against the legatees. Fladong *v.* Winter, 19 Ves. 196.

In Cockerell *v.* Barber, 16 Ves. 461, lord Eldon has distinctly laid down that a legacy in foreign specie must be paid in this country according to the current value of that specie, without any reference to the rate of exchange, or, what was the same thing, the expense of remittance. Raymond *v.* Brodbelt, 5 Ves. 199; Phipps *v.* Anglesea, 5 Vin. Ab. 209, pl. 8.

Sir Edward Sugden and Mr Simpkinson, for the defendant.

His honour's decree is founded in substantial justice, and is not inconsistent with authority. Nothing can be more fair than that the legacy should go to extinguish *pro tanto* the amount of the judgment debt subsisting at the testator's death; nothing more mischievous than that a premium should be held out for laches, and that a legatee, while he evades the payment of his obligations with impunity, should be thereby enabled to swell the amount of his cross demand. If, as might have happened, this judgment had been the only assets left by the testator, the plaintiff's claim would have been continually accumulating, while the fund to discharge it remained stationary. The law of set-off, which was intended to prevent a circuity of actions, rests on a tacit understanding between persons mutually indebted, that a balance shall be struck between the opposite claims as they arise, and that the amount of the difference only shall constitute the debt. Jeffs *v.* Wood is not to be explained away; it did not stand on the footing of agreement, but was a decision upon the general principle, and has been uniformly followed. Ranking *v.* Barnard, 5 Mad. 32.

Upon the lapse of time, the principle established in Cholmondeley *v.* Clinton, 2 J. & W. 1, is applicable. Acquiescence for upwards of twenty years in the right of a party in possession, or against whom a claim was never brought, is a bar in equity as well as at law. That principle has been repeatedly extended to legacies. The language of lord chief baron Eyre in Jones *v.* Turberville, 2 Ves. Jun. 11, is extremely strong to that effect; and is only a recognition of the doctrine which had been laid down and acted upon long before in Smith *v.* Clay, Amb. 645, 3 Bro. C. C. 639, n. There is no evidence whatever of these legacies having been claimed in the long interval between the year 1790, when the testator died, and the year 1821, when the bill was filed by the party representing the legatees; neither is there any evidence that the assets were deficient. At the time of the testator's death, which took place in Jamaica, the legatees were domiciled in that island, where a regular series of administrations has been taken out from 1791 downwards. The legatees must have had little faith in the validity of their own claim, when they assigned their supposed title for the paltry consideration of 25*l.* All the circumstances of the case confirm instead of weakening the presumption arising from the lapse of time.

In calculating the difference between pounds sterling and pounds in Jamaica currency, the Master, by adopting the nominal instead of the real standard of value, has added to what ought to have been the estimated amount of the legacies at the rate of twenty-two and a half per cent. The

permanent standard of value as between this country and Jamaica is in the ratio of fourteen to ten; in other words, when the exchange is at par, 100*l.* sterling are equivalent to 140*l.* Jamaica currency. But the actual rate of exchange is twenty-two and a half per cent beyond par in favour of this country; so that every 100*l.* paid in this country are in fact equal to 162*l.* 10*s.* Jamaica currency, and thus the legatees would, upon the Master's calculation, gain twenty-two and a half per cent upon the whole amount of their legacies. All they are entitled to receive, admitting the validity of the claim, is the value of the legacies in pounds sterling or bills of exchange, supposing them to be paid in Jamaica.

August 23.—The Lord Chancellor (lord Brougham). By the first of the three exceptions brought under review on this appeal, a question was raised touching the right of a legatee, who was also indebted to the testator upon a bond, to retain and set off his legacy against the amount of the bond debt: and, upon a full consideration of the case, I am of opinion that his honour has decided rightly in allowing that exception.

The next exception related to a subject of more general importance, and as I have not here the good fortune to agree with his honour in the conclusion to which he has come, it is proper that I should state the facts of the case more fully, and assign the reasons for my difference of opinion.

The last exception had reference only to the mode in which the value of certain legacies given in Jamaica currency were to be estimated; and, as I think that those legacies ought not to be paid, the question as to the value of the currency, or the manner in which that should be ascertained, does not arise.

My observations, therefore, will be confined to the question raised by the second exception: and the facts upon which the judgment will turn, are shortly these:

The testator died in 1790, having bequeathed to John Campbell, who survived him, two legacies of 1000*l.* each, the right to which came into discussion under the former exception already adverted to. The present question, however, does not arise upon them, but upon two legacies of 500*l.* given by the will to two other legatees, from whom the plaintiff, who is the personal representative of the same John Campbell, and as such entitled to the two former legacies, purchased them for the sum of 25*l.* each, that is to say, five per cent upon the principal, and at the same time had them regularly assigned to him. And the question now being, whether the plaintiff, by virtue of that assignment, is entitled to those legacies of 500*l.*, I am disposed to hold, so far differing from his honour's judgment, that, in the peculiar circumstances of this case, the plaintiff has failed to make out his title; and to that extent, therefore, that the order should be reversed.

Although the testator's death happened in the year 1790, no steps were taken by the legatees, either during the life of John Campbell, or afterwards, to assert their claims under the will: nor did the present plaintiff, at whatever time he acquired his title, resort to any measures for the recovery of these legacies prior to the year 1817. In that year a demand, or something like a demand, appears for the first time to have been made on behalf of the legatees, and that was the earliest symptom which the parties exhibited of their being alive to their interests under Mr Graham's will. The bill was filed in 1821. Here then is a period of at least seven-

and-twenty years, or, reckoning down till the filing of the bill, of more than thirty years, during the whole of which the plaintiff, or those in whose shoes he stands, were perfectly quiescent and inactive with regard to any claims they might intend to assert against the testator's estate.

The question, putting it in a general form, is very important; whether laches of so long a duration, leaving so many years to elapse, so many deaths to occur, and so many changes of circumstances and parties to take place, whether in such a case the mere lapse of time ought not of itself to operate here, as it certainly would with respect to any demand at law, I will not say as a bar, but as constituting such an acquiescence as justifies a court of equity in presuming payment? The statute of limitations, while it endeavoured to apply a remedy to the case of simple contract debts and actions upon tort, to personal and mixed actions as well as to other rights of a real nature, left the case of actions upon specialties, judgments as well as bonds and recognizances, entirely unprovided for: and many complaints in consequence arose, traces of which are to be met with both in the *dicta* and decisions of our early judges. Lord Hale was among the first who countenanced the notion, that, after lapse of time, satisfaction might be presumed even of a specialty; and that doctrine, which subsequently received the assent of lord Harwicke, derived some confirmation from the statute of William, 10 and 11 W. 3., c. 14. by which twenty years were fixed as the period of limitation for reversing judgment by writ of error. Following the analogy afforded by that statute, or more probably rather the analogy of the period within which personal or mixed actions for the recovery of real rights are limited, the courts have come to adopt the doctrine of lord Hale by a pretty uniform train of decisions: and they now hold that the lapse of twenty years, if not taken as a positive bar, shall at least be fatal to actions upon bonds, the judge always directing the jury, under such circumstances, to presume, in the absence of contrary evidence, that the debt has been satisfied. If interest is proved to have been paid, or if upon demand, any acknowledgement has been made that the debt remains still unsatisfied, there is, of course, an end of the presumption. On this subject considerable diversity of opinion has prevailed among the judges at different times; Lord Mansfield going a good deal farther than others have done with respect to the period that must elapse in order to found the presumption; and Mr Justice Buller having once or twice said that he had known instances where eighteen years had been considered as sufficient for that purpose.

The cases where the subject has been chiefly considered, are a case at law in Burrows, 4 Burr. 1962; Oswald *v.* Legh, T. R. 270, and as far as this court is concerned, Fladong *v.* Winter, 19 Ves. 196, and Wynne *v.* Waring, which is stated in the report of that case. In the two latter, the presumption of payment is admitted to be capable of being rebutted by circumstances; not only the circumstances already adverted to, of acknowledgement, on a demand made, or a statement of inability to pay, or an actual payment of interest, which at all events keeps the claim alive, but by the insolvency of the specialty debtor, or his incapacity to discharge his obligations. In Fladong *v.* Winter, lord Eldon decided in favour of the report (which was against the debt), unless the exceptant chose to try the question at law. There seems to be some inaccuracy in the note of what fell from his lordship on that occasion: for that eminent judge is represented as expressing his surprise that no attention was paid to the

material circumstance of the bond having remained in the hands of the obligee; "a circumstance," adds his lordship, "of great weight." But it is to be observed, that in all but those very rare cases where, upon the principle adopted in Read *v.* Brookman, 3 T. R. 151, the party is permitted to declare upon a lost instrument, this circumstance, on which lord Eldon lays so much stress, must of necessity occur. If it were not so, the question never could arise; for it is only by reason of the appearance of the bond, because the instrument is on the spot and is produced, that the court presumes the debt to be still subsisting. Counsel, no doubt, endeavour to contend that that circumstance is itself a proof that the debt must remain unpaid: since it would be a singular thing if the obligor, who paid it, should leave so important a document in the hands of the creditor. But the court invariably refuses to listen to any such argument. The language of the judges in such cases is, "the creditor has chosen to lie by for twenty years: true it is, he may have kept quiet possession of the bond; but to supply the defect in the statute of limitations, to show our enmity to stale demands, and our adherence to the principle of *vigilantibus non dormientibus servat lex*, it is our duty to lean strongly in favour of the presumption."

If that be the clear rule as to specialties at law, notwithstanding the production of the instrument uncancelled, and simply because twenty years have been suffered to elapse without any steps taken against the debtor, what rational ground can be suggested for excluding the same doctrine from courts of equity in the peculiar equitable matter of a suit for the payment of a legacy? If the foundation of the rule at law be considered, it should seem that precisely the same principle justifies courts of equity in adopting a similar course. The facilities possessed by a legatee for recovering his legacy from the personal representative, are just as great as those possessed by an obligee for recovering his bond debt from the obligor. Exactly the same presumption arises from his long quiescence; the presumption either that the demand has been satisfied, or that he does not mean to enforce it; and there is this material difference between the cases,—the one is a volunteer, the other a creditor for valuable consideration: the obligee is a creditor for high value, the evidence of consideration, the deed and seal being of so high a nature in the law, that no proof can be given of the want of consideration, and except as between creditors, the party is estopped from alleging that no consideration passed. In point of fact, however, in almost every bond transaction a money consideration has been given.

I cannot see, therefore, why the same doctrine should not be applicable to equitable as to legal jurisdiction: but as nothing can be more dangerous than to proceed upon reasons of analogy, even where they only follow the course pursued by courts of equity in adopting the practice of the common law, I should not feel myself justified in that inconsiderable, and, as it seems, reasonable and beneficial step, if I did not find that the principles upon which I am disposed to make it, had been recognized by the decisions of this court and by the *dicta* of my predecessors in office. The case to which I would particularly refer in that view is Hercy *v.* Dinwoody, 4 Bro. C. C. 257, 2 Ves. Jun. 87. The doctrine is there laid down in the way in which it is safest to propound it, that equity has not yet established, nor the practice of this court adopted any rule, which makes twenty or twenty-five, or even thirty years a bar, any more than the courts of law have, with respect to specialty debts, but that each case must depend on its own

circumstances. Courts of law, indeed, have gone somewhat farther: for they consider it as the next thing to a necessary presumption; they throw the proof on the other side, on him that would rebut the presumption. Their language is, "if no contrary circumstance appears, twenty years shall be an absolute bar." In Hercy *v.* Dinwoody, lord Alvanley said, that no certain rule had been worked out by the court, but that each case was to depend upon its own circumstances, with a strong leaning, however, to take into consideration the lapse of time, when no contrary circumstance rebutted it.

These principles are sanctioned by the high authority of lord Camden in the case of Smith *v.* Clay, 3 B. C. C. 639. n., Amb. 645, of which there is an imperfect account in Ambler, but which is well reported, from the notes of the learned judge himself, in the third volume of Mr Brown's Chancery Cases, in a note to the case of lord Deloraine *v.* Browne. It is true that Smith *v.* Clay was at first a good deal cavilled at and objected to. The way, however, in which those objections—objections evidently taken *per incuriam*—have yielded to further inquiry and reflection is extremely remarkable and instructive, and greatly adds to its weight as an authority. In Pickering *v.* Lord Stamford, 2 Ves. Jun. 272, a case undoubtedly of great value, though rather perhaps for the argument, than for the particular point which it decided, lord Alvanley, the Master of the Rolls, in the first breaking of the case, expresses an opinion extremely adverse to Smith *v.* Clay. When the counsel for the defendant, referring to Smith *v.* Clay, cited the language of lord Camden, that "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time," the Master of the Rolls observed, "That was a bill of review I believe; it is clear there was a mistake." And on the counsel proceeding, his lordship again carps at it, saying, "They were not bound to know the decree was wrong. They knew there was such a will, and they knew there was a decree. I think there ought to be a bill of review at any distance on error apparent." This was upon the first argument of the case. When he next comes to consider the question, however, after an interval of nine or ten days had given him time to reconsider the matter, and to reflect a little upon the authority of Smith *v.* Clay, his lordship takes a very different view. His words are, "The court has adopted rules upon that, as far as they could, by analogy to the rules of law. Twenty years' possession is a bar to the equity of redemption of a mortgagor. There certainly may be cases in which, after a length of time, though it may not be pleadable, this court would hold a bill to come too late. If a party, having knowledge of his rights, will sit still, and, without asserting them, permit persons to act as if they did not exist, to acquire interests, and consider themselves as owners of the property to which the other will not assert his claim, there is no reason that I know of why every presumption should not arise, as in the case of a bond." His lordship, upon the former occasion, had said, there ought to be a bill of review at any distance from error apparent. That is not the same doctrine which his lordship lays down here; for he says, "There is no reason that I know of why every presumption should not arise, as in the case of a bond. Jones *v.* Turberville is a very clear case, in which the lords' commissioners held a legacy barred after forty years, and would not entertain the bill. Now if this," he proceeds, "had been the case of a legacy, I should have been of opinion that there was a

bar in the presumption of satisfaction." The case of Pickering *v.* Stamford, then under lord Alvanley's consideration, was very much mixed up and complicated; the question which it involved mainly relating to a charity; but he states, that if it had been a simple naked case of a legacy, he should have been of opinion there was a bar in the presumption of satisfaction. Coming afterwards to Smith *v.* Clay, which he appears now to be much more disposed to follow, because he was better acquainted with it, he says, "Smith *v.* Clay will be found much more fully reported in Brown, in the note to Lord Deloraine *v.* Browne, than in Ambler,"—a passage from which it seems highly probable that he had not before examined the excellent report in Brown:—he adds, "it is well worth reading; it not only decides the point as to not opening a bill of review after twenty years, even for error apparent on the record, but there is a great deal of sound doctrine laid down with regard to parties neglecting to prosecute their rights, in a manner which very much distinguishes the decrees of that noble lord."

I consider his lordship's opinion in favour of that case as a grave authority: and what renders his assent to it the more valuable is, that it was yielded slowly and with reluctance, and as the result only of further consideration, a result most creditable to his candour. I am also justified in assuming the well considered assent which he gave, to go a great deal farther than the particular point in the cause, and that though the question was only upon a bill of review, he approved of the general doctrine contained in the judgment.

The subsequent part of lord Alvanley's judgment, which I admit certainly to be the law, is also well deserving of attention. "At the same time, I know no rule," he says, "that has established that mere length of time will bar. If I did, I would dismiss the bill. Therefore, that being the case, I am to say whether under such circumstances a bar can be presumed." And upon the circumstances of that case, holding as he did in Hercy *v.* Dinwoody, that the particular circumstances of each case must decide, he did not dismiss that particular bill, although he stated that if it had been the case of a legacy he certainly would have dismissed it. The time there was five-and-thirty years. The cause came on again some time afterwards (2 Ves. Jun. 581), and there also he refers to the doctrine in Smith *v.* Clay and Hercy *v.* Dinwoody, and makes this observation, "the bill certainly requires very extraordinary circumstances to sustain it at so late a period, and the first question is, whether at this distance of time it is too late to make the claim." After expressing his regret that the rule was not here as in courts of law, nearly amounting to a bar, he continues, "But when I admitted that, as I did fully in Hercy *v.* Dinwoody, and in this cause, it does not follow that the bill may not be dismissed, though it cannot be pleaded to. The question in all these cases is, whether there are motives of public policy or private inconvenience to induce the court to say, under all the circumstances, the suit ought not to be entertained." And the rest of his reasoning proceeds upon the same grounds, leaning strongly towards a presumption in favour of payment or satisfaction in cases of long acquiescence.

This brings me to the second observation to which the case of Smith *v.* Clay is liable, namely, that it was the case of a bill of review, and not an original demand of a debt or legacy. That is no doubt true: but it is equally true that the same principles upon which Smith *v.* Clay was decided are most strictly applicable to the cases of a common debt, and of a

claim under a will. "Nothing," says lord Camden, "can call forth this court into activity but conscience, good faith and reasonable diligence: where these are wanting the court is passive, and does nothing." And the doctrine laid down by his lordship is, that it is the rule of this court always to discourage stale demands, and to throw upon the party coming after long acquiescence, the burthen of showing why he lay by so long.

A party buying a legacy of 500*l.* for 25*l.* after seven-and-twenty years has elapsed, and then allowing four years more to pass before filing his bill, making altogether a laches of more than thirty years, in my apprehension has himself to blame, if he finds when he comes into this court, that his remedy is gone. Upon the principle of some of these cases, therefore, and upon the authority of others, admitting nevertheless that no one has gone so far as to say that mere lapse of time can be pleaded as a bar, and stating also that I can find no case in which the precise period of seven-and-twenty years has been held to be sufficient to shut the doors of a court of equity against such a demand, as too stale to be enforced—upon the principles and the reasoning in some of these cases, and the actual decisions in others, I am disposed to hold that the plaintiff has come too late, and that the doors of this court ought not now to be thrown open to him, inasmuch as, to use lord Camden's expression, the court cannot be called into activity to aid a demand, be it for a legacy or for a debt, unless with good faith and with good conscience a reasonable degree of diligence shall have been used. To say that this is laying down a new doctrine, because the precise period of seven-and-twenty years is not found in other cases, is evidently a narrow and superficial view of the subject. As the question, however, is one of great importance in itself, and as, where the courts below have differed, the superintending authority of the court of the last resort is extremely desirable (although I entertain no doubt as to the soundness of the judgment I have given), it would perhaps be on the whole more satisfactory if the case were carried for final adjudication to the house of lords.

The plaintiff has since presented a petition of appeal to the house of lords.

Stratton *v.* Davidson.

Russell and Mylne, 484.

In a suit for the specific performance of a contract for the sale of an estate in the West Indies, against a purchaser who resided there, and had got into possession without paying the purchase-money, and to which the consignees of the estate were also defendants, an application for a receiver of the proceeds of the consignments was refused, the principal defendant, the purchaser, having never been served with a subpœna.

April 20, 21, 1830.

THE Solicitor-General and Mr Tinney moved, that the defendants, who were the consignees of the produce of a West India estate, might be restrained from paying over the proceeds to the other defendant Symonds, who was out of the jurisdiction, and that a receiver might be appointed.

According to the case made by the bill, the plaintiffs were the vendors

of the estate in question. One of the defendants, Symonds, was the purchaser, who had been allowed to take possession of the property under a verbal agreement, and had continued to retain it ever since the year 1814 without completing his contract, and without paying either rent or interest on his purchase-money. The other defendants, Davidson & Co., were merchants in London, to whom the produce of the estate was consigned by the purchaser. Symonds had never been served with process; but in the year 1829, during a short stay in this country, which he visited on his way to Scotland, where his relations resided, a negotiation was carried on with him through the medium of his solicitor, for the purpose of inducing him to perform his part of the agreement. That negotiation, however, eventually failed and came to nothing; and while he was either in Scotland or on his voyage back to the West Indies, the present bill was filed, praying to have the contract specifically executed.

Mr Pemberton, for the consignees, opposed the motion.
The Solicitor-General, in reply.

The Lord Chancellor. This suit is instituted to enforce the specific performance of a contract relating to the purchase of a property in St Vincent; a contract which was entered into by a person who was then a resident in that island. The purchaser, Mr Symonds, many years afterwards, but before a conveyance was made, came over to this country for some particular objects of his own. It does not distinctly appear how long he remained in England, but it was a very short time only; and during his stay negotiations were set on foot, which were ultimately broken off, respecting the completion of the transaction for the purchase. Mr Symonds afterwards proceeded to Greenock, and there embarked for St Vincent, where he now resides. There is nothing to show that he left England for the purpose of avoiding service of process. This is an application for the appointment of a receiver of the produce of the estate: but the defendant, whom this motion principally seeks to affect, has had no notice, and has never been served with process; and under such circumstances it would be the extreme of injustice to grant the application(*a*).

Motion refused, with costs.

Barnes *v.* Wilson. Tarleton *v.* Dyer.

Russell and Mylne, 486.

A CAVEAT tendered at the proper office after a decree has been delivered to the secretary for enrolment, and forwarded to the Lord Chancellor in order to be signed, comes too late to prevent the effect of enrolment, although in point of fact the signature was not adhibited till after the caveat was tendered.

The enrolment of a decree will not be vacated merely on the ground of

(*a*) See Tanfield *v.* Irvine, Coward *v.* Chadwick, 2 Russ. 149, 150, n., where several other cases on the subject are referred to.

despatch used by the party enrolling, or of surprise upon the opposite party, where no fraud or deception has been practised.

A party is not bound to communicate to his adversary his intention to enrol the decree, because the latter informs him of his intention to appeal against it.

April 23, 24, 1830.

De Geneve *v.* Hannam.

Russell and Mylne, 494.

AN order to amend, obtained in violation of the 13th of the new orders, may be treated as a mere nullity; although, therefore, it remains undischarged, it is no answer to a motion to dismiss the bill.

If notice of a motion to dismiss a bill for want of prosecution is given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made.

April 23, 1830.

In the Matter of Joseph and Webster.

Russell and Mylne, 496.

If a motion, after being refused with costs in the court below, be renewed upon new facts and evidence in the court of appeal, it may be granted with costs, it being substantially an original motion.

Jurisdiction of the court of chancery in awards, under the 9 & 10 W. 3., c. 15.

April 23, 1830.

THE Solicitor-General and Mr Stuart moved that an order of his honour the Vice-Chancellor might be rescinded, and that a writ of attachment might issue against Webster for non-performance of an award.

It appeared from the affidavits that a sum of money had been claimed by Joseph as due to him from Webster, in his character of executor to the debtor, and that there being no cause then depending between them, Webster joined with him in a general submission of all matters in dispute to an arbitrator, which submission was regularly made an order of the court of chancery, under the provisions of the 9 & 10 W. 3., c. 15. The award pronounced in pursuance of that reference directed, that a sum of 19*l.* 19*s.* 4*d.* should be "paid out of the assets which might be in Webster's hands, or which might be coming to him." The costs of the reference, which he was also directed by the award to pay, were taxed by the Master at 23*l.* On the 25th of July 1829, Joseph moved that Webster might be ordered to pay the sum awarded, together with the costs, on the ground that a general submission was an admission of assets. The Vice-Chancellor, however, upon the reading of an affidavit by Webster, stating that

[In the Matter of Joseph and Webster.]

he had no assets in hand, and that he was then considerably out of pocket on account of his executorship; and, in consideration of the peculiar language of the award, refused the application with costs.

The motion having been renewed before the Lord Chancellor, a further affidavit was filed on behalf of Joseph, stating facts and circumstances from which it was to be inferred that subsequently to the discussion before his honour, Webster had received assets, and had, then and now, upwards of 100*l.* of the testator's property in his hands.

Mr Spence, who appeared for Webster, opposed the production of this affidavit, on the ground that it was not before the Vice-Chancellor, and that in fact it was now used to support quite a new case; but Const *v.* Barr, 2 Russ. 161, being cited as an authority in favour of the admissibility of the affidavit, the Lord Chancellor recognized and approved of the doctrine there laid down, and directed the affidavit to be read: and upon the effect of that evidence, he decided that Webster was bound to pay the money in pursuance of the award.

On the question of costs, it was then contended that a general submission to arbitration was, as between the parties, an admission of assets both at law and in equity. Robson *v.* ———, 2 Rose, 50. That must always be a necessary implication; otherwise *cui bono* the expense and trouble of the reference? Here there was a reference; that is to say, an admission of assets, which no denial of the party could be permitted to countervail.

On the other side reliance was placed on the very special wording of the award, by which the debt was directed to be paid out of assets when they should come into Webster's hands, a point which had seemed so clear to his honour, that when he refused the application, he allowed Webster his costs.

The Lord Chancellor. The question now stands before me precisely as if this were an original motion; and if a party succeeds in an original motion, the court is frequently in the habit of giving him costs. According to the case made before the Vice-Chancellor, his decision was perfectly correct; for, upon the evidence laid before his honour, there were then no assets in the hands of Webster, and the application was to enforce an award which was to pay money out of assets, if there were any, and if not, out of future assets. The Vice-Chancellor thought there was nothing to satisfy him that there were any assets; and he therefore dismissed the motion. On the evidence before me, however, it appears that there are assets; but as the case is now brought forward on additional facts and evidence, I must consider this to be substantially a new motion, and the costs of the application ought, therefore, to be given to the successful party(*a*).

(*a*) Applications of this kind, to enforce an award where no cause is depending, though of every day's occurrence in courts of law, are extremely unusual in the court of Chancery. So rare indeed have they been, that the officers of that court were not aware of any precedent, and were disposed to doubt the jurisdiction. Mr Tidd, 2 Pract. 821, 9th edit., has expressed a similar doubt, on the ground that the statute of 10 W. 3, c. 15, is confined to courts of record. The language of the second section, however, as observed by Maddock, 2 Ch. Pr. 712, is altogether unintelligible if the act be held not to extend to submissions which have been made orders of a court of equity: and in Godfrey *v.* Bercher, 3 Vin. Ab. 139; Lonsdale *v.* Littledale, 2 Ves. Jun. 451; Nichols *v.* Chalice, 14 Ves. 265, and other cases where the effect of the statute came incidentally into discussion, the jurisdiction has never been questioned; though,

In the Matter of the Estate of Mary England, deceased.

Russell and Mylne, 499.

Where a father has deserted his children, and is not of ability to maintain them, the court will make an order, referring it to the Master to approve of a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infants that a certain sum should be raised out of the property to which they are absolutely entitled under a will; and upon the Master's report that it is for their benefit, and with the consent of the executors of that will, the court will order the sum to be raised accordingly.

Rolls.—April 28, 1830.

THIS was the petition of Nathaniel Knott, the sole executor of the will of Mary England, who thereby gave her residuary estate to the three children of John Knott, the brother of the petitioner.

John Knott had separated from his wife Helena Knott, who was the mother of the three children, in the year 1818, and was resident in England in very reduced circumstances, and not of ability to maintain his children. The three children, upon the separation, were left with the mother, who resided in the East Indies, and, in the year 1820, two of the three children were sent to the petitioner to be educated in England, and had ever since remained with him at an expense for their maintenance and education of 500*l.*

The testatrix, Mary England, died in July 1829; and the petition stated that all the debts of the testatrix had been paid, and that her residuary estate to a considerable amount was invested in the public funds.

The petition, after setting forth these circumstances, further stated that the mother of the children was able and willing to maintain her children, if they returned to her in India, and that she and the two children were desirous that they should so return; but that the expense of the voyage to India would be 300*l.*, which the mother had no means of defraying. The prayer was, that the petitioner might be at liberty to sell part of the residuary estate of Mary England, to which the three children were absolutely entitled, for the purpose of raising the two sums of 500*l.* and 300*l.* to be applied in payment of the past maintenance of the two children, who were still infants, and in payment of their expenses to India.

In support of the petition was cited Ex parte Myerscough, 1 Jac. & Walk. 151.

The Master of the Rolls. This petition is entitled in the matter of the estate of Mary England deceased, and the petitioner is the sole executor of the will. It is in effect a petition for the partial administration of Mary England's estate, which can be done only upon a bill filed for that purpose, and no order therefore can be made upon this petition. If the petition had been entitled in the matter of the two infants, and had been

as those have been chiefly upon submissions made in causes, to which, according to the better opinion, the statute does not apply, 1 Mad. Ch. Pr. 296, ii. 713, it was not necessary formally to consider the point. But the submissions in Webster v. Bishop, Pr. Ch. 223, 2 Vern. 444, and Spettigue v. Carpenter, 3 P. W. 361, seem to have been made orders of the court of Chancery under the statute; and in the principal case the jurisdiction was not disputed.

[In the Matter of the Estate of Mary England.]

the petition of the infants, I should have made an order referring it to the Master to appoint a proper person to act in the nature of a guardian to these infants, and to inquire whether it would be for their benefit that the sum of 300*l.* should be raised out of their shares of the residuary estate of Mary England, in order to defray their expenses to India; and upon the Master's report that it would be for their benefit, and with the consent of the executors of Mary England, I would order the 300*l.* to be raised accordingly and paid to the person appointed to act in the nature of a guardian.

With respect to the 500*l.* which has been the expense of the maintenance and education of these infants, and which was incurred before the death of Mary England, this can form no debt upon the property acquired by her will, and no order can be made for raising it.

To save expense, I will permit the petition to be amended in the manner which I have mentioned.

The petition was afterwards amended, and the order was made accordingly(*a*).

Naylor *v.* Arnitt.

Russell and Mylne, 501.

A testator devised lands to trustees upon trust, out of the rents and profits to pay two annuities, and subject thereto to permit A., and after him his wife, to receive and take the rents and profits during their respective lives; and, after the decease of the survivor, he devised the lands to their children: Held, that the trustees could grant a valid lease of the lands for a term of ten years.

Rolls.—May 1830.

WILLIAM NAYLOR devised all his real estates to Francis Arnitt and William Morrell, their heirs and assigns, upon trust, out of the yearly rents and profits, to pay to his wife, Elizabeth Naylor, the yearly sum of 60*l.* during her life, which annuity was also secured by a power of entry and distress, and to Miriam Bolton an annuity of 10*l.*, and subject to these annuities, to permit and suffer William Horner Naylor to receive and take the rents, issues, and profits during his life; and after his decease, to permit and suffer Elizabeth, the wife of William Horner Naylor, to receive the like rents, interests and proceeds, provided she so long continued his widow; with limitations over in favour of their children. Power was also given to the trustees, with the consent of William Horner Naylor in his lifetime, and after his decease, at their sole discretion, to sell any part of the real estate for the purpose of raising money for the advancement of any of the children.

A few weeks after the death of the testator, the trustees granted to Simpson a lease of the lands for ten years.

William Horner Naylor had children who were infants.

The bill was filed by the tenants for life against Arnitt, the surviving

(*a*) See Ex parte Swift, Ex parte Chambers, post.

[Naylor *v.* Arnitt.]

trustee, and Simpson, principally for the purpose of setting aside the lease.

It was alleged that the lease had been granted fraudulently and corruptly: but it was admitted in the argument, that the plaintiffs had not made out a case of fraud and collusion: and the question then was, whether the trustees had, under the will, power to grant a lease for a term of years.

Mr Pemberton and Mr T. Parker for the plaintiffs, argued that the will did not give the trustees any discretionary authority in the management of the estate, and that the purposes of the trust were not such as to render it necessary that they should have a power of leasing. Their duty was merely to let the lands from year to year, and to apply the rents so accruing in the manner directed by the will. A lease granted by them ought not to bind the *cestuis que trust*, except to the extent of the interest of such of the *cestuis que trust* as had assented to it.

Mr Bickersteth and Mr J. Russell, contrà.

The Master of the Rolls held, that the trustees had power to demise the lands for a term of ten years; and declared the lease valid.

Byam *v.* Munton.

Russell and Mylne, 503.

A bequest of a moiety of the interest of the residue of the testator's personal estate, held, upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty.

Rolls.—May 4, 1830.

ANTHONY MUNTON disposed of the residue of his property in the following words: "I give and bequeath all my real estates, and all the rest, residue and remainder of my personal estates and effects whatsoever and wheresoever unto my wife, Hester Munton, my brother the Rev. William Munton, and my sister-in-law, Ann Byam; and I direct them, or the survivor of them, to dispose of and convert into money, as soon as conveniently may be, such part thereof as shall consist of money or securities for money, and to call in and receive all debts and moneys due to me, and to lay out and invest the whole of my real and of my residuary personal estate in the names of them, or the survivors or survivor of them, in the public stocks or funds, or permanent government or real security or securities, at interest; and I give and bequeath the interest, dividends and produce *of the whole of my real estate, and of the residue of my personal estate*, or the securities in which the same may be invested, to my dear wife, Hester Munton, for and during the term of her natural life for her own use and benefit; and, after the decease of my dear wife, I give and bequeath one full and clear moiety of the interest, dividends and produce of the *residue of my personal estate and effects*, or the stocks, funds, or securities in which the same shall be invested, to my brother, the Rev. William Munton, his executors, administrators and assigns; and I give and bequeath the other full and clear moiety of the interest, dividends and

produce *of the residue of my personal estate* and effects, or the stocks, funds, or securities in which the same shall be invested, to my sister-in-law, Ann Byam, for and during the term of her natural life, for her own use and benefit; and, after the decease of my sister-in-law, Ann Byam, I give the *whole of the principal of such moieties, or the whole residue of my estate whatsoever or wheresoever*, and the stocks, funds and securities in which the same shall be invested, and the interest, dividends and produce thereof, to my brother, the Rev. William Munton, his heirs, executors, administrators and assigns, to and for his or their use and benefit."

The question was, whether the bequest of a moiety of the interest, dividends and produce "of the residue of my personal estate," did or did not, upon the whole tenor of the will, give Ann Byam a moiety of the rents of the real estate till sold, and afterwards of the interest of the proceeds arising from the sale of them, as well as a moiety of the interest of the residue of the produce of the testator's personal estate.

Mr Wray and Mr Goodeve, for the plaintiffs.
Mr Bickersteth and Mr Bethel, for the heir.
Mr Pemberton and Mr Simpkinson, for other defendants.

The Master of the Rolls said, that the testator had made one mixed fund of the residue of the personalty, and the proceeds of the sale of the real estate; that the whole was to be invested in government stocks or on real securities, and the interest was to be paid to the widow during her life; that there was no intention that, upon her death, a division should take place of the personalty from the produce of the realty; and, in fact, such a division could not be made; that therefore the testator, in the moiety given to Ann Byam during her life, meant to include the real estate; and that this conclusion was strengthened by the clause immediately following, in which the testator used the phrase "the whole of the principal of such moieties," as synonymous with and equivalent to "the whole residue of my estate whatsoever and wheresoever," and which was, consequently, a declaration that the moieties of which he spoke were moieties of the whole residue of his estate.

His honour therefore declared that Ann Byam, upon the death of the testator's widow, became entitled during her life to a moiety of the rents of the testator's real estates, till they were sold, and afterwards to a moiety of the interest arising from the net proceeds of the sale, as well as to a moiety of the interest of the residue of the personal estate.

Davis *v.* Thomas.

Russell and Mylne, 506.

Though, in cases of non-payment of money, the court will relieve against penalty or forfeiture; yet, when it is not a question of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, the privilege is lost, if the money be not paid accordingly.

Rolls.—May 5, 1830. L. C., July 7, 14, 25, 1831.

THE plaintiff, being entitled to the equity of redemption of a certain estate, conveyed the same by a deed of release, dated the 29th of September

1820, to Mrs Twyning, the mortgagee, in consideration of 1800*l.*, which was made up of the mortgage debt, and of an additional sum of money paid to him. On the 1st of January 1821, the mortgagee demised the estate to the plaintiff for a term of ninety-nine years, determinable on the death of the survivor of him, his wife and son, at a rent of 105*l.*, payable half-yearly at Lady-day and Michaelmas: and on the lease there was indorsed an agreement signed by the mortgagee, by which it was stipulated, that, in case the plaintiff regularly paid the rent due at Lady-day by the 4th of June, and the rent due at Michaelmas by the 26th of October, he should be at liberty to repurchase the premises at the price of 1850*l.* at any time within five years; but if default were made in the payment of the rent within the stated periods, the agreement was to be void. The plaintiff failed in the payment of his rent at the periods stated, and distresses for it had been levied on the premises; but, within the five years, he applied to repurchase, and at the same time tendered the arrears of rent then due. The defendant refused to permit the repurchase; and the bill was filed by the plaintiff to have the benefit of the stipulation in that respect, or to be let in to redeem.

The bill imputed fraud to the defendant, and represented the estate as having been, in 1820, worth about 3000*l.*: but these allegations were not established by the evidence.

Mr Pemberton and Mr Parker, for the plaintiff.

This case rests upon the same principle with those in which the court has interfered to relieve against the non-payment of rent at a day certain; and as the court by giving interest can make compensation for the delay of payment, the relief prayed ought to be granted.

A conveyance with a right of repurchase is in the nature of a mortgage: it is a mere security for a sum of money. Mellor *v.* Lees, 2 Atk. 494; Floyer *v.* Lavington, 1 P. W. 268; Willett *v.* Winnell, 1 Vern. 488. The right of repurchase must have been in the contemplation of the parties when the terms of the purchase were settled.

Mr Bickersteth and Mr Wakefield, contrà, insisted that the agreement, giving the right of repurchase on certain conditions, was a transaction totally distinct from the purchase; that the right did not arise unless this condition was strictly fulfilled; and that the payment of the rent within specified periods had been made of the essence of the contract.

The Master of the Rolls. In all cases of the payment of money, where penalty or forfeiture is introduced for the purpose of security, there a court of equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest. But where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege must show that the money was paid accordingly:—as in a case of interest reserved on a loan at five per cent with a proviso that four per cent will be accepted, if paid within a limited time after it becomes due:—or in the case of a covenant for the renewal of a lease on the payment of a certain fine at a stated period. Here it is admitted that the rent was not duly paid at the stipulated times, and no fraud, surprise or accident is alleged; and the plaintiff is, therefore, not entitled to the repurchase which he claims by this bill; and the bill must be dismissed with costs.

[Davis *v.* Thomas.]

July 7, 1831.—The plaintiff appealed from his honour's decree.

Sir Edward Sugden and Mr Parker, for the plaintiff.

Once a mortgage, always a mortgage, is an invariable rule. Before the right to redeem can be destroyed, the nature of the transaction must be altogether changed. The naming of a day, within which the repurchase is to be made, amounts to nothing; for that is no more than is done in every mortgage deed. The law does not allow a redeemable security to be converted into an absolute estate, nor can the right of redemption be clogged or restricted by conditions. Floyer *v.* Lavington, 1 P. W. 268; Willett *v.* Winnell, 1 Vern. 488; Mellor *v.* Lees, 2 Atk. 494. It is a continuing right which subsists independently and in defiance of agreement. The court looks with the utmost jealousy upon clauses of repurchase, which are generally mere shifts to get rid of the redeemable character of the securities, or to obtain a higher rate of interest than the law allows. If, indeed, a man comes in clearly as an absolute purchaser in the first instance, the seller may there without danger be permitted to stipulate for a limited right of repurchase; but here the alleged purchaser was originally a mortgagee. All the instruments form parts of one and the same transaction: for the mere lapse of a few months, which were no doubt allowed to intervene as a blind, cannot disguise the real nature of the proceeding. Herring *v.* Brown, 1 Vent. 368, Carth. 22, 2 Show, 199. The whole of the circumstances strongly corroborate this view of the conduct of the parties. The plaintiff was under the pressure of pecuniary difficulties, and had no professional adviser. The property, it appears, was worth upwards of 3000*l.*; and there was no formal conveyance to the purchaser, who merely took a release of the equity of redemption, and was never let into possession. The possession remained unchanged, a circumstance affording a clear proof that there must have been some private understanding, to which the plaintiff's continuance in possession is to be referred. The rent fixed exceeds by a trifle five per cent upon the sum advanced; and the demise, therefore, was most probably a device to evade the statutes against usury.

The court has never held time to be of the essence of the contract with respect to the payment of rent; and all rent being tendered or paid up, the party is bound specifically to execute his contract. The legislature has provided a special remedy for the landlord, in case the rent be not regularly paid; and equity will not deal more hardly with a party in default than the law. The statute 4 Geo. 2., c. 28, has given to the defendant her rent and interest, or, if she prefers it, a forfeiture of the lease. Courts of equity, however, have gone a step further, and established as a principle, that, where the party failing to perform the act stipulated can restore matters to the same state (which can always be done where nothing more than a money payment is required), relief will be given against the penalty or forfeiture, on full compensation being made. Marks *v.* Marks, P. Ch. 486, 10 Mod. 420; Astley *v.* Weldon, 2 B. & P. 346; Seton *v.* Slade, 7 Ves. 265.

The Solicitor-General (sir W. Horne) and Mr Wakefield, contrà.

It is clear upon the evidence, that this was not a mortgage, but a sale. There is no proof beyond surmise, that the different proceedings constituted one transaction. On the contrary, the time that intervened between them (for the lease was more than three months posterior to the conveyance, and that, two years posterior to the mortgage), shows that they were

distinct and independent. Supposing, however, that the mortgage could be connected with the sale, and that the sale and the demise had been contemporaneous, still the clause of repurchase, though inserted in favour of one who had formerly been a mortgagor, must be construed strictly; and if he has neglected to perform the act which was made the condition of his obtaining the indulgence now sought, he can have no claim to the assistance of the court. It was so decided in Ensworth *v.* Griffiths, 5 B. P. C., Toml. ed. 184, in the house of lords; and the language of the lord keeper in Barrell *v.* Sabine, 1 Vern. 268, supports the same doctrine. The stipulation, which, if fulfilled, was to be the foundation of his title, the punctual payment of the rent, constitutes a condition precedent, against a breach of which equity will not give relief. In fact that title has never arisen; and the object of the plaintiff in the present suit is not so much to be relieved against the forfeiture of a right once acquired, as to create and enforce a new right at the defendant's expense.

It was clearly of the essence of the contract that the rent should be paid regularly, and that if any failure took place in that particular, no benefit should be claimed from the proviso. The words imposing that restriction on the right of repurchase are as strong as possible; and effect must be given to their obvious meaning, unless the last clause in the agreement is to be struck out and treated as a nullity.

July 14.—Sir Edward Sugden, in reply.

The continuance of the plaintiff in possession has not been explained. According to the defendant's own showing, there must have been a period during which the plaintiff occupied the lands without a title: for the purchase was made at one period, and the lease was granted at another, three months afterwards. It has been found convenient for the defendant's argument to keep those two transactions as widely as possible apart. Upon what ground could the vendor be suffered to retain the property in his hands without any title (and none is alleged) from September till the following January? His possession must be referred to the same agreement with the execution of the release, and it then becomes apparent that all the proceedings are parcel of one entire transaction. The several instruments, the mortgage, conveyance and demise, which compose so many links in the chain, all amount to this—that the plaintiff should pay a higher rate of interest than the law permits, and that if he could repay the principal within a certain time, he should then get back the estate. The right reserved to the plaintiff is nothing but a power to redeem within a limited period. In Barrell *v.* Sabine, possession was delivered immediately, and the purchaser had never been a mortgagee. Ensworth *v.* Griffiths is strongly in the plaintiff's favour; for there had been five years' possession there, and the words were extremely stringent as to time, and yet redemption was decreed.

July 25.—The Lord Chancellor (lord Brougham). In this case the plaintiff mortgaged certain property to a person of the name of Twyning for 1200*l.*, and in the year 1820 he borrowed a further sum of 200*l.* on the same security. On the 29th of September in that year a deed of release was executed by the plaintiff, whereby he, for a valuable consideration, released the equity of redemption to the defendant the mortgagee. On the 1st of January 1821, the defendant demised the premises to the plaintiff at a rent of a hundred guineas a year for ninety-nine years, and

upon that demise was indorsed the agreement on which the present question turns.

It was first said at the bar that this all formed one transaction, and that you cannot in any way convert a mortgage, which is in its nature redeemable, into an irredeemable security. It was next contended that time was immaterial, and that the non-payment of the rent within the period stipulated ought not to be a defeasance of this sort of condition, or to exclude the party from the benefit of his claim ; a claim which I am inclined to agree with his honour in viewing rather in the light of an indulgence than of a strict right.

As to the first of these grounds, even if this were not a question of mortgage made two years before, but to be treated as a sale in 1820, with an agreement for a repurchase three or four months afterwards, I cannot regard the whole of these proceedings as one and the same transaction. Upon the best attention which I have been able to give to the whole of the evidence, I see no ground whatever for asserting that these various instruments all constitute one transaction. I think the testimony, by which the imputations of fraud were attempted to be sustained, entirely fails : and with respect to the over-value, the evidence is in my opinion quite inconclusive ; for, instead of the value amounting, as was alleged, to 3000*l.* and upwards, it is distinctly stated in the depositions that the property was not at the time worth more than 2000*l.*

With respect to the redeemable or irredeemable nature of the security, several cases were cited ; among the rest, Mellor *v.* Lees, 2 Atk. 494, where lord Hardwicke has said, that, if fetters were laid upon the right of redemption, with a fraudulent design to get an estate, it would not avail. And clearly it would be so, even if there were no fraudulent design, inasmuch as the case supposed by his lordship is inconsistent with the nature of the security ; mortgage for the sole purpose of securing money being the substance of the transaction, and the rest being an accessary only, which must follow the nature of the principal.

Upon the other question, can I reasonably hold, that where a man has mortgaged an estate, and two years afterwards has made a conveyance of that estate, and then, again, three months subsequently, upon obtaining a lease of the same estate from the purchaser, procures to be indorsed upon that lease, by way of indulgence, a power to repurchase the property on certain terms,—can I reasonably hold, that, because he obtains this power of repurchase, all the different instruments form parts of one conveyance? And yet, unless I am to hold that, and unless I am to lay it down moreover, that the man, who possesses such a right of repurchase, though acting with his eyes open, and using words the most stringent (and no words can be stronger than those which are employed here), to make time of the essence of the contract, can never, in any event, deprive himself of the benefit of that contract, I cannot possibly arrive at the conclusion that the decision of his honour ought to be reversed. Looking to the language of the condition, which is positive and express, I cannot say that the plaintiff comes in due time, or that he has entitled himself by his conduct to the benefit which he now claims.

Appeal dismissed.

Hunloke *v.* Gell.

Russell and Mylne, 515.

Although a will does not state that it is made in execution of a power, yet if it plainly refer to and comprise the subject of the power, it will be deemed a good execution.

Construction of clauses in a settlement and will relative to allowances for the maintenance of younger children.

Rolls.—May 4, 5, 10, 1830.

BY the settlement made on the marriage of the late sir Thomas Windsor Hunloke, bearing date the 16th of October 1807, certain estates in the county of Derby were conveyed to trustees and their heirs, upon trust for sir Thomas Windsor Hunloke for life; and after his decease, to the intent and purpose that Ann Eccleston, the intended wife, might receive 1200*l.* a year for her life by way of jointure; and subject thereto, to the use of Thomas Lord Viscount Anson and Thomas William Coke, for a term of 1000 years; remainder to the use of or in trust for all and every or such one or more son or sons of the marriage, or any issue male of such son or sons as sir Thomas should by deed or will appoint, and for want of appointment to the use of the first and other sons of the marriage in tail male; and for default of such issue to sir Thomas Windsor Hunloke, his heirs and assigns.

As to the term of 1000 years thereinbefore limited unto lord Anson and Thomas William Coke, it was declared that the same was limited upon trust that, in case there should be any child or children of sir T. W. Hunloke by Ann Eccleston, his intended wife, other than such child or children as by virtue thereof, or by virtue of any appointment or appointments to be made in pursuance thereof, should be or become entitled to the whole of the lordships, manors, capital and other messuages, lands and hereditaments thereinbefore mentioned, or to some part or parts thereof, amounting in value to the sum of 3000*l.* or 2600*l.*, as the case might be, according to the events next therein provided, then and in such case lord Anson and Thomas William Coke, or the survivor of them, or the heirs, executors, administrators and assigns of such survivor, should, after the decease of sir T. W. Hunloke (or in his lifetime, if he should so direct), by any deed or writing under his hand and seal, attested by two or more credible witnesses, by mortgage, sale or other disposition of all or any part of the hereditaments comprised in the said term for all or any part of the said term, or by the rents and profits of the same premises, or any part thereof in the mean time, or by such other ways and means as therein mentioned, levy and raise, for the portion or portions of such child or children, the sums of money therein mentioned; that is to say, that if there should be but one such child, then the sum of 3000*l.* for the portion of that one child; and the same should be an interest vested in and paid to the child for whom the same was thereby intended to be provided, on or at such age, day or time, and in such manner, and should be attended with such provision for his or her maintenance and advancement as sir T. W. Hunloke should by any deed or deeds, in-

strument or instruments in writing, &c. or by his last will, &c. direct or appoint; and in default of such direction or appointment, the said sum of 3000*l.* should be an interest vested in such one child, being a son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years or on the day of her marriage, which should first happen, and should be paid to him or her on or at the said age, day or time, if the same should happen after the decease of sir T. W. Hunloke, but if the same should happen in his lifetime, then immediately after his decease; and if there should be two or more children for whom portions were intended to be thereby provided as aforesaid, but not more than six, then lord Anson and T. W. Coke, and the survivor of them, and the executors, administrators and assigns of such survivor, should, by the ways and means thereinbefore mentioned, levy and raise such sum of money as should be the amount of as many sums of 3000*l.* as there should be such children; and if there should be more than six such children, then the said Thomas Lord Viscount Anson and Thomas Windsor Coke, and the survivors of them, and the executors, administrators and survivors, should, by the several ways and means thereinbefore mentioned, levy and raise such a sum of money as should be the amount of as many sums of 2600*l.* as there should be such children; and the sum of money so intended to be eventually provided for portions as thereinbefore mentioned, should be an interest vested or interests vested in all and every or such one or more, exclusively of the other or others, of the children for whom the same respectively was intended to be thereby provided, and should be paid to him, her or them respectively, on or at such age, day, or time, or respective ages, days or times, and divided between and among them, or any of them, and attended with such right or benefit of survivorship between or among them, and with such provisions for their or any of their maintenance and advancement in life, and subject to such conditions, and under such restrictions, and generally in such manner for their or any of their benefit, as sir T. W. Hunloke by any deed or deeds, instrument or instruments in writing, &c. or by his last will, &c. should direct or appoint, and in default of any such direction or appointment, and so far as any such direction or appointment should not extend, the whole of the said sum of money intended to be thereby provided for portions, should be divided between or among the children, in respect to whom the amount of the same should be calculated, in equal shares and proportions,—the shares of sons to be an interest vested at their respective ages of twenty-one years, and the shares of daughters to be an interest vested at their respective ages of twenty-one years or days of marriage, which should first happen, and to be paid to them respectively on or at the same ages, days or times respectively, if the same should happen after the death of the said sir T. W. Hunloke; but if the same should happen in his lifetime, then immediately after his decease: and it was thereby declared that, if there should be two or more children for whom portions were intended to be thereby provided, and any one or more of them should die without having obtained a vested interest in the portion provided for him, her or them respectively, then, unless sir T. W. Hunloke should in exercise of his power of appointment expressly direct the contrary, the portion intended to be provided for the child or children so dying should not survive to the other or others of the children, but should sink into and be consolidated with the freehold and inheritance of the said manors and hereditaments; and further, that no child, taking or becoming entitled to any share of the money intended to be thereby

provided for portions under an exercise of the power of appointment thereinbefore given to the said sir T. W. Hunloke, should be entitled to any share of the unappointed part of the said sum of money, without bringing his or her appointed share of the same into hotchpot, and accounting for the same accordingly. And upon this further trust that lord Anson and T. W. Coke, or the survivor of them, his executors, administrators or assigns, should, from and after the decease of sir T. W. Hunloke, out of the rents, issues and profits of the said hereditaments and premises, raise and pay such yearly sum and sums of money for the maintenance and education of such child or children for the time being presumptively entitled to portions, in the mean time and until his, her or their respective portion or portions should become due and payable respectively, as to the same trustees or the survivors of them, his executors or administrators, should seem meet, not exceeding for any one such child what the interest of his or her then presumptive portion would amount to after the rate of 5*l.* for every 100*l.* by the year; such yearly sum or sums for maintenance to be paid and payable half-yearly: and it was provided that it should be lawful for lord Anson and T. W. Coke, and the survivor of them, and the executors, administrators and assigns of such survivor, after the death of sir T. W. Hunloke, or in his lifetime, at his request in writing, to raise by virtue of the term, any sum or sums of money for the preferment or advancement in the world of any such child or children during his or her or their minority, not exceeding the amount of his or their future or expectant portion or portions; and if such advanced sum or sums of money should be equal to the whole of such expectant portion or portions, the same should be accounted in full satisfaction of the whole thereof accordingly; but if such advanced sum or sums should be less than such expectant portion or portions, the same was to be received and accounted as part, and was to be deducted out of the portion or portions of such son or sons respectively for whose use and benefit the same should be so applied, so always that the sum or sums to be raised for any one such child during his or her infancy were not contrary to or inconsistent with any such direction or appointment as sir T. W. Hunloke in his lifetime should make or execute touching the raising and paying the portion or portions of such child or children. It was also declared that the said manors and hereditaments were limited to lord Anson and T. W. Coke, their executors, administrators and assigns for the said term of 1000 years, upon the further trust that, after the decease of sir T. W. Hunloke, and subject and without prejudice to the said annual sum of 1200*l.* thereby limited to the said Ann Eccleston, and subject to the trusts before expressed for raising portions for the daughters and younger sons of the marriage, lord Anson and T. W. Coke, and the survivor of them, and the executors, administrators and assigns of such survivor, during the minority or respective minorities of any person who, under any of the limitations thereinbefore contained, or any exercise of the power of appointment thereby limited to sir T. W. Hunloke, should be entitled to the said manors and other hereditaments in remainder immediately expectant on the said term of 1000 years, should receive the yearly rents, issues and profits of the said manors and other hereditaments, and apply a competent part of the same for or towards the maintenance, and education and support of the person so for the time being entitled as thereinbefore mentioned, and lay out and invest the residue of the same in their or his names or name in the purchase of parliamentary stocks or public funds of

Great Britain, or at interest upon government or real securities in England, to be from time to time altered and varied at their or his discretion, and should receive the interest, dividends and annual produce of the said sums of money, stocks, funds and securities, and lay out and invest the same in their or his names or name in or upon other stocks, funds and securities of a like nature, and repeat such receipts, layings out and investments so and in such manner that the said issues, rents, profits, stocks, funds, securities, interest, dividends and annual produce, and the resulting income of the same respectively might during any or every such minority as aforesaid accumulate in the nature of compound interest; and that lord Anson and T. W. Coke and their executors, administrators and assigns, should stand and be possessed of and interested in the said rents, moneys, stocks, funds and securities, and the interest, dividends and annual produce of the same, and the resulting income thereof, and the accumulations thereof, in trust for all and every and such one or more exclusively of the other or others of the child or children or remoter descendant or descendants of sir T. W. Hunloke by the said Ann Eccleston as sir T. W. Hunloke should by any deed or instrument in writing, &c. or by his last will, &c. direct or appoint; and in default of such direction or appointment, in trust for all and every the child and children of the said sir T. W. Hunloke by the said Ann Eccleston, who being a son or sons, and not for the time being entitled as thereinbefore mentioned, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, to be divided between or among the said children, if more than one, in equal shares, and if but one, the whole to be in trust for that one child; and if there should be no such child, should lay out and invest the same in the purchase of freehold or copyhold messuages, lands, tenements and hereditaments, and settle and assure the same to the uses, upon and for the trusts, intents and purposes, and with, under, and subject to the powers, provisos, agreements and declarations thereinbefore expressed and then subsisting, or capable of taking effect.

The marriage took effect. Sir Windsor Hunloke died in the month of January 1816, leaving his wife and one son and two daughters him surviving; and having made a will dated the 16th of January 1816, which was in the words following:

"Short heads of the will of sir Thomas Windsor Hunloke, usually residing at Wingerworth in the county of Derby, Bart., but now at Paris, No. 87 Rue de Grenelle Fauxbourg St Germain, parish of St Thomas D'Aquin; all my estates and effects, real and personal, I do give to my son Henry Thomas John Joseph Hunloke, his heirs and assigns, so soon as he shall have attained the age of twenty-one years, subject to the annuities and payments hereinafter named; remainder to my brother James Hunloke, and to his son or sons lawfully begotten; remainder to my two daughters Charlotte and Eliza Hunloke, as co-heiresses, and to their heirs and assigns; remainder to any daughters my brother James may have, and to their heirs and assigns as co-heiresses; remainder to my heir at law; 1200*l.* to be paid yearly to lady Hunloke during her life, and the dowager lady Hunloke's life; and in case the dowager should first die, then lady Hunloke to have 1500*l.* per year for the remainder of her life; 500*l.* per year to be paid to lady Hunloke, to be applied to the maintenance and education of my son Henry, until he shall have attained the age of twenty-one years, and 200*l.* per year additional for the last two

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years of his minority; 450*l.* per year to be paid to lady Hunloke for the maintenance and education of each of my two daughters before named, until they have attained the age of twenty-one years respectively, and then to be paid 200*l.* per year each additional, till death or marriage; and in case of marriage, then the annuity to cease, and to receive 3000*l.* to their fortune, in addition to the 3000*l.* already provided for them by lady Hunloke's marriage settlement; 400*l.* per year to be paid to my brother James Hunloke during his life, over and above any sum or sums that may have been secured to him on my estates by any former will or wills; 350*l.* per year to be paid to each of my two sisters, Margaret and Charlotte Hunloke during their respective lives, over and above any sum or sums that may have been secured to them on my estates; and in case my son Henry should die before he has attained twenty-one years of age, and my estate should come to my brother James, I do then direct that my two daughters have 20,000*l.* each to their fortunes on marriage as aforesaid; and if either of them should die before she is entitled to her fortune, then the survivor to have 10,000*l.* additional on marriage."

The testator was seised of estates of considerable value, which were not comprised in the settlement; and, in the year 1821 an act of parliament was passed to enable certain trustees to sell these unsettled estates for the purpose of paying off incumbrances, and creating a fund to answer the charges under his will. The unsettled estates were accordingly sold, and after discharging all incumbrances, there remained a considerable surplus.

The accumulations which had been made by the trustees of the 1000 years' term from the death of sir Thomas Windsor Hunloke, amounted to a very large sum.

The present bill was filed by the only son, who was still an infant, for the purpose of carrying into effect the trusts of the settlement and will.

One of the two daughters had attained the age of twenty-one years; the other was still under twenty-one; and both were unmarried. The mother of the testator was dead. The trustees of the 1000 years' term had from time to time advanced certain sums for the maintenance and education of the son, which did not amount to the 500*l.* a year mentioned in the will of the father; and had also from time to time advanced to lady Hunloke certain sums for the maintenance and education of the daughters, which were less than the sums of 450*l.* a year mentioned in the father's will.

The material question in the cause was, whether the will could be considered a good execution of the power given to sir Thomas Windsor Hunloke by the settlement.

On the one hand it was argued, that in the will there was no reference to the power; that the words used were all words which, in their natural sense, were fitted to pass interests which the testator could devise; that the words could be satisfied without having recourse to the subject of the power; and that there was no indication of an intention, on the part of the testator, to effect any thing otherwise than by devise.

On the other side, reference was made to various directions in the will, which, it was alleged, showed that the testator considered himself to be dealing with the subject of the power; and if he meant to deal with the subject of the power, he must necessarily have meant to execute the power. Lewis *v.* Lewellyn, 1 Turn. & Russ. 104; Denn d. Nowel *v.* Roake, 5 B. & C. 720; Napier *v.* Napier, 1 Sim. 28; Lownds *v.* Lownds, 1 Y. & J. 415; Colpoys *v.* Colpoys, Jac. 451; Standen *v.* Standen, 2 Ves. Jun. 589, were cited.

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Another question was, whether lady Hunloke was entitled to have the sums which had been advanced to her by the trustees for the maintenance and education of her children, made up to her so as to amount to 500*l.* a year for the son, and 450*l.* a year for each of the daughters from the death of her husband, during their respective minorities, and out of what fund such addition should come. As incidental to the discussing of this question, one point which came under consideration was, whether the testator could give his daughters maintenance out of the settled estates, exceeding the interest of the portions to which they were entitled under the settlement.

Mr Pemberton and Mr Monro, for the plaintiff.
Mr Bickersteth and Mr Blunt, for the daughters.
Mr Tinney and Mr Loftus Lowndes, for lady Hunloke.
Mr Roots and Mr Jacob, for other parties.

The Master of the Rolls. The material question here is, whether upon the will it is manifested that the testator had in his view the property over which he had the power of disposition by the settlement; and I am of opinion that it does appear by the contents of the will, that the testator intended it should operate upon the settled as well as the unsettled estates. It is plain that the settlement was present to his mind, because, in providing portions for his daughters, he expressly refers to it. By the settlement he had the power to limit an estate tail to his son; and in default of issue, he had in himself the reversion in fee of the settled estate. And it was well observed in the argument at the bar, that this reversion in fee would pass by the remainder limited in the will to his brother James Hunloke and his sons; and that it necessarily follows, that, by the prior limitation to the testator's son, he intended him to take all that would pass by the remainder. Moreover, speaking of the 1200*l.* a year to lady Hunloke, he plainly refers to the settlement. By the settlement, the allowance for the maintenance and education of the son was to be at the discretion of the trustees, and when, by his will, he fixes the allowance at 500*l.* a year, he must be understood to mean, that such sum should not be an addition to, but should comprise the allowance for the maintenance and education given by the settlement. By the settlement, the allowance for the maintenance and education of daughters was left in his power, and if he did not exercise such power, it was not to exceed the income of their portions; and when by his will he fixes maintenance at 450*l.* a year, it cannot be intended that he meant that they should take also the income of their portions under the settlement. Upon the whole, therefore, his will manifestly extends to the settled as well as to the unsettled property, and is an execution of all powers given him by the settlement.

The son, therefore, attaining twenty-one, will take the fee in all the estates. Lady Hunloke, in addition to the 1200*l.* a year under the settlement, will take 300*l.* a year for her life from the unsettled property; and is entitled, out of the unsettled property, to have the sums advanced to her by the trustees for the maintenance and education of her son made up to 500*l.* a year from the death of the testator, with an addition of 200*l.* a year for the last two years of his minority. She is also entitled to have the sums advanced to her by the trustees for the maintenance and education of her daughters made up 450*l.* a year for each during their minorities, not out of the unsettled, but out of the settled property, inasmuch as the testator had the power by the settlement of fixing the amount of their

allowance. The daughters, as they attain twenty-one, will be entitled to receive out of the accumulated funds an annuity of 600*l.* until marriage, and then to receive a portion of 6000*l.*; and if they should not marry, they will have a power of disposing at their deaths of their original portion of 3000*l.* under the settlement. This effect will be produced upon the principle of election; it being plain that the testator meant, that the annuity of 450*l.* should be substituted for their original and additional portions of 3000*l.* until marriage.

The annuities to the father and sister of the testator must be provided for out of the unsettled property; and it must be referred to the Master to take an account of what is now due to them in respect of these annuities.

Stanley *v.* Robinson.

Russell and Mylne, 527.

Where a person having a clear title to 12*l.* for rent, and claiming the property of the land, is induced, by the representations of two professional persons that he had no right to either rent or land, to agree to accept 10*l.* in full, for rent and land, the court will not entertain a bill for the specific performance of the agreement.

A defendant cannot avail himself of a matter in defence, which appears only upon his evidence, and was not stated in his answer. But if the plaintiff, upon his own case, is not entitled to the relief prayed, the court will not assist him.

May 11, 12, 1830.

JOSEPH ROBINSON, the brother of the defendant, was at his death entitled to certain leasehold property held under the earl of Shrewsbury. The plaintiff, sir Thomas Stanley, in February 1822, purchased the leasehold of the executors of Joseph Robinson. The defendant was at the time, and had been for some years previously, in possession of a piece of adjoining land, which he claimed under his father. Sir Thomas Stanley at the same time became his tenant of this land at a rent of 6*l.* per annum, which was duly paid for the first two years. Sometime afterwards a question was made by sir Thomas Stanley, whether the land which he thus rented from the defendant, was not part of the earl of Shrewsbury's estate, and comprised in the lease which sir Thomas Stanley had purchased from the representatives of Joseph Robinson; and a dispute arose respecting the payment of further rent to the defendant. In the month of June 1824 the defendant attended, by appointment, at the mansion-house of sir Thomas Stanley, where he met the solicitor of sir Thomas Stanley and the agent of the earl of Shrewsbury, and the defendant then demanded 12*l.* for the two years' rent which had accrued due since the last payment, and offered to take 50*l.* for his interest in the land; but, being informed by sir Thomas's solicitor and lord Shrewsbury's agent that he had no property in the land, and no claim for rent, he was induced to give up his claim for rent, and all his right in the land for the sum of 10*l.*, which was then paid to him; and he afterwards dined in sir Thomas's servants' hall, in company with the groom and coachman, who were ex-

amined in the cause as witnesses, to prove his admission to them that he had made the agreement stated.

The defendant afterwards brought an ejectment to recover possession of the land; and this bill was filed by sir Thomas Stanley, praying the specific performance of the defendant's agreement, and that he might execute an assignment of his interest in the land.

The defendant in his answer stated, that the 10*l.* was paid to him on account of rent, and denied the agreement alleged in the bill.

Mr Temple and Mr Rolfe, for the plaintiff.
Mr Spence, for the defendant.

May 12.—The MASTER of the ROLLS. The agreement alleged in the bill is proved, but it by no means follows that the plaintiff is entitled to the relief prayed. The defendant, being a man in an humble class of life, and without any advice or protection on his part, is induced to enter into the agreement stated, by the representations of two professional persons, that he had no claim for the rent, nor any right to the land. In this representation the two persons were mistaken. The plaintiff, being the tenant of the defendant, could not have escaped from the payment of the rent then due to the defendant, even if the latter had no right to the land; and the defendant being entitled, at all events, to receive 12*l.* for rent, this court will not compel him to perform an agreement into which he is surprised, and by which, in consideration of 10*l.* only, he is not merely to give up the 12*l.* due to him for rent, but is to assign all interest which he claims in the land. It is true that the defendant has not so shaped his defence, and has, in his answer, denied the agreement. But the distinction is this: a defendant is not permitted to avail himself of a defence which appears only upon his evidence, and was not stated in his answer, so that the plaintiff could be prepared to repel it. But if it appears, upon the plaintiff's own case, that he is not entitled to the relief prayed, the court will not assist him. The bill must be dismissed with costs.

Humphreys *v.* Wagstaff.

Russell and Mylne, 529.

WHERE tithes have never been paid since the dissolution, the court will presume all facts, which, consistently with the evidence in the cause, would give legal origin to an exemption from the payment of tithes.

May 12, 18, 1830.

Cocker *v.* Quayle.

Russell and Mylne, 535.

By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond: if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest.

May 19, 1830.

IN this case, by a marriage settlement, the interest of the trust fund was to be paid to the wife during her life for her separate use, but without power of anticipation; and after her death, to the husband for life, if he survived her; with remainder to the children of the marriage; and a power was given to the trustees, with the written consent of the wife, to lend the trust money to the husband upon the security of his bond. The trustees, with the consent of the wife, advanced the trust money to the husband, but without taking any bond from him. The husband afterwards became bankrupt.

The bill was filed by the husband and wife and the children of the marriage, for the purpose of compelling the trustees to replace the trust fund. It was stated in the answer of the surviving trustee, that the wife's written consent was given; but there was no evidence in support of the allegation; and it was not pretended that any bond had been taken from the husband.

At the hearing the defendants prayed an inquiry whether the wife had not given her consent in writing.

Mr Pemberton and Mr T. Parker, for the plaintiffs.

Mr Bickersteth, Mr Wray and Mr John Wilson, for the defendants.

A trustee, it was argued on behalf of the defendants, could not be made answerable, unless actual loss had been sustained in consequence of his breach of trust. Here the trustees were empowered to lend the fund to the husband on the security of his bond: they had lent it to him without taking his bond. In the one case they would have had a demand on him by specialty; in the other the demand was merely for a simple contract debt; but, under the commission of bankrupt, the former species of debt would have had no priority to the latter; the fund, therefore, had sustained no loss which it would not have suffered equally, if the trust had been executed in the strictest manner.

If the trustees should be held answerable, yet an individual who assented to the breach of trust, or procured it to be committed, could not take advantage of their liability; and if that individual had any interest in the fund, it would be applied *pro tanto* in indemnifying the trustees from the responsibility which the court might throw upon them. That doctrine was acted upon by lord Eldon in Brice *v.* Stokes, 11 Ves. 325, 326, where, though a trustee was made answerable for the principal of the fund, a *cestui que trust*, tenant for life, who had concurred in the breach of trust, was held not entitled to relief. It was recognized in Underwood

v. Stevens, 1 Mer. 712. In Coltman *v.* Warren, decided in 1825, lord Gifford applied the same rule against a married woman, who had acquiesced in the breach of trust which was the subject of complaint. Here both the wife and the husband procured the breach of trust to be committed, and acquiesced in it; they, therefore, were not entitled, in a court of equity to relief against individuals by whose conduct they had profited, and of whose mistake they were themselves the cause. If the court, on behalf of the children, ordered the trustees to replace the fund, that fund should be considered, in relation to the other plaintiffs, as having no existence; and till the interests of the children came into possession, the dividends ought to be applied to the indemnification of the trustees. It was true, that the wife had not the power of anticipating the income arising from this property; but at present the question was not as to anticipation. She had by her own act annihilated the fund out of which that income was to arise; and she had no right to call upon the defendants to replace the fund for her benefit.

For the plaintiffs it was argued, that the moment the trustees lent the money to the husband, in a manner not warranted by the marriage settlement, they became answerable for the amount; and this liability could not be removed from them by any subsequent event. It could not be denied that they were liable the hour before the bankruptcy of the husband: how could his bankruptcy place them in a better situation?

In Brice *v.* Stokes, the person whose life interest was applied in exoneration of the loss thrown upon the trustees, was fully competent to bind himself, and to raise, by his own acts, equities against his own claim; and, therefore, the decision there had no application to the case of a married woman. This lady had no power to anticipate the enjoyment of the fund; still less could she, even as against herself, endanger the safety of the capital. By no act or contract of hers could she have parted with the right to the interest or dividends to accrue in any future year; how, then, could she enable another person to raise against her an indirect equity, which was to deprive her of these dividends in all time to come? Even if she had not been excluded from the power of anticipation, the trustees could not have claimed to indemnify themselves out of her life interest. Underwood *v.* Stevens, 1 Mer. 712; Ryder *v.* Bickerton, 3 Swanst. 80, n. In the latter case a trustee, who had been guilty of a breach of trust, in which it was alleged that the husband and wife concurred, insisted that he was not liable to make satisfaction to her during her life. But lord Hardwicke held, that he had no defence against her claim. "The power of the wife," said his lordship, "must arise out of the articles, for, after the marriage, she had no power to prejudice herself. The power is, that she and her husband must give their consent to the placing out the money on security; therefore, she could not consent to the placing out the money on no security at all."

The Master of the Rolls. The trustees cannot be excused from a breach of trust in lending the money without the security of the husband's bond, by reason of the subsequent event of the husband's bankruptcy. The inquiry asked for, as to the written consent of the wife, is immaterial, as it is not pretended that a bond was taken from the husband. Although the interest was to be paid to the wife for life for her separate use, yet she had not an absolute power of disposition of that interest, but a power qualified by the terms of the settlement. She could not grant the

interest by anticipation, nor could she authorize the loan to her husband without her consent in writing, and upon a security by bond. No act of hers, unless according to the terms of the settlement, could, therefore, bind her. Those terms are to be considered as prescribed in order to protect her against the influence of her husband. The trust fund must, therefore, be replaced. If the husband should survive the wife, the trustees will be entitled to the benefit of his life interest.

The assignees of the husband were not made parties to the suit, but appeared by counsel at the hearing, and consented to be bound by the judgment of the court(*a*).

Champion *v.* Rigby.

Russell and Mylne, 539.

A solicitor, who purchases from his client, is bound to prove that he paid that price for the property, which, in the exercise of his professional duty, he would have advised his client to accept from a third person.

After a delay of eighteen years, a bill filed by a client against his solicitor to avoid a purchase, was dismissed.

Rolls.—May 20, 1830.

THE bill was filed to set aside a sale of property, made, it was alleged, at a great under-value to the defendant, who at the time was the confidential solicitor of the plaintiff, and when the plaintiff, to the knowledge of the defendant, was in embarrassed circumstances.

The transaction complained of took place eighteen years before the bill was filed, and the delay on the part of the plaintiff was not satisfactorily accounted for.

Mr Bickersteth and Mr Younge, for the plaintiff.
Mr Tinney, Mr Pemberton and Mr Spence, for the defendant.

The MASTER of the ROLLS dismissed the bill on the ground of the delay, but stated that a solicitor, who purchased from his client, was bound to prove that he had paid that price for the property which, in the exercise of his professional duty, he would have advised his client to accept from a third person; and not being satisfied that this had been the case with the defendant, he dismissed the bill without costs.

(*a*) See Capell *v.* Butler, 2 Sim. & Stu. 457; Bozon *v.* Bolland, supra, p. 69; White *v.* Hall, supra, p. 332.

Esdaile *v.* Gall.

Russell and Mylne, 540.

A testator devised in the following words: "As to the rest of my estate, the two houses, one in St John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my wife for her life, and after her decease, that in St John's Lane to my daughter; the other between my two sons, to be equally divided:" Held, that the daughter took only an estate for life, in the house in St John's Lane.

Rolls.—May 22, 1830.

THE bill was filed by a vendor to enforce the specific performance of a contract to purchase a house in St John's Lane. The defence was, that a good title was not shown.

The title of the vendor arose under the will of John Mayer, dated 1735, which contained a devise in the following words: "As to the rest of my estate, the two houses in St John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my loving wife Mary Mayer, for life, and after her decease, that in St John's Lane to my daughter Mary Mayer, the other between my two sons John and Joseph Mayer, to be equally divided; as to the rest of my estate, of what nature soever, one third to my wife, and the rest to be divided equally among the three children.

The title of the vendor was derived from Mary Mayer, the daughter: and the question in the cause was, whether the interest which she took under her father's will in the house in St John's Lane, was a fee-simple absolute, or only an estate for life?

The Master was of opinion that she took only an estate for life, and reported against the title; and the question now came before the court on an exception to the report.

Mr Treslove and Mr J. Martin, for the exception, contended that the word *estate* was so applied to the subject of the devise as to give the devisee a fee, though no words of limitation were used; the more so, because the testator, when he did not mean to give the fee, as in the devise to the wife, limited her interest expressly by the words "for life;" and they cited Denn *v.* Hood, 7 Taunt. 35; Ibbetson *v.* Beckwith, Cas. Temp. Talb. 157, and Wilkinson *v.* Chapman, 3 Russ. 145.

Mr Bickersteth and Mr Stuart, for the defendant.

The MASTER of the ROLLS held, that Mary Mayer did not take the fee-simple under her father's will, and overruled the exception.

Critchett *v.* Taynton.

Russell and Mylne, 541.

A devise of real estate to all the younger children of the testator's daughter, as tenants in common, with a devise over in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be devested in that event, unless a different interest appeared from the subsequent part of the will.

The first husband of the daughter was living at the time of making the will, and at the death of the testator, and although it was plain that the testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage.

Rolls.—Mary 22, 24, 1830.

THE testator, John Hughes, after giving some legacies and devising a real estate to his son-in-law John Billingsley in fee, disposed of the residue of his property in the following words: "All the rest, residue and remainder of my estates, both real and personal, of what nature or kind soever, I give and devise unto Hugh Valence Jones, of St Alban's Street, in the county of Middlesex, and unto Peter Waldo, of Mitcham, in the county of Surrey, esquires, and the survivor of them, their heirs, executors, administrators and assigns, in trust to pay and apply the rents, interest, dividends and proceeds thereof, unto my daughter Sarah Billingsley for and during the term of her natural life, for her sole and separate use and benefit, and so as the same shall not be subject or liable to the debts, contracts, or engagements of her said husband; and receipts signed by my said daughter only shall at all times be a sufficient discharge for the same; and my will and meaning is, that the receipts of no other person or persons whatsoever, during the life of my said daughter, but those signed by her proper hand only, shall be a discharge for the said rents and proceeds of my real and personal estate. And from and after the decease of my said daughter, I give and bequeath all my personal estate, of what nature or kind soever, unto my next of kin, who as such would be entitled thereunto under the statute of distribution. And I also give and devise, from and after the decease of my said daughter, all the rest, residue and remainder of my real estates, of what nature or kind soever, unto her second, third, fourth and every younger child or children, share and share alike, as tenants in common; but in case my said daughter should die, leaving no issue behind her, or if my said daughter's second, third, fourth, and every other child does not attain his, her, or their respective age or ages of twenty-one years, and not married before such age with the consent of my son and daughter, and the survivor of them, I give and devise my estate in the parish of Lerkhampton, in the said county of Gloucester, now in the possession of William Rose, and fifty acres of land, be the same more or less, adjoining part of the said estate, which I bought of Thomas White, unto my sister Elizabeth Gregory, and her heirs for ever; and I also give and devise all the rest, residue and remainder of my real estates, of what nature or kind soever, in the parish of Cheltenham aforesaid, unto

my sister Mary Marsham and her heirs for ever. And that no misconstruction may be put upon the word *consent*, my will and meaning is, that my said son and daughter, or the survivor of them, shall be subscribing witnesses or witness at the wedding of such child or children that shall so marry before his, her, or their respective age or ages of twenty-one years, otherwise such child or children shall not have or receive any benefit from this my will."

The testator's daughter Sarah, at the making of the will, and at the death of the testator, was the wife of John Billingsley, by whom she had five children; and after his death she intermarried with the defendant Richard Critchett, by whom she had ten children. Two of the children by the first husband, and five of the children by the second husband, died in the lifetime of their mother under the age of twenty-one years, and unmarried; and no child married under the age of twenty-one years.

Two questions were made in the cause: first, whether the children of the second marriage were entitled equally under the will with the children of the first marriage; secondly, whether the children, who died under twenty-one, and unmarried, took vested interests.

Mr Jemmett, for the plaintiffs.

Mr Bickersteth, Mr Hayter, Mr Purvis and Mr Lynch, for different defendants.

On the first point it was argued, on behalf of the children of the second marriage, that the words "her second, third, fourth, and every younger child or children," included all her children, whether by her first or by any subsequent husband; and Barrington *v.* Tristram, 6 Ves. 345, was cited.

On the other hand, it was said that the question was simply as to the intention of the testator; and it was manifest from the language of the will that he had not any children in contemplation, except children of his daughter by her then husband Mr Billingsley. The children included within the devise must be the same with those, upon the death of whom under twenty-one, and unmarried, the limitations over were to take effect. Now they were children, who, if they married under twenty-one, were to marry with the consent of "my son and daughter, or the survivor of them;" and the testator further requires "my said son and daughter, or the survivor of them, to be subscribing witnesses or witness to the wedding." In these phrases the word *son* necessarily refers to Mr Billingsley; and the devise must, therefore, be confined to the children of the daughter by Mr Billingsley.

On the second point it was argued, on the one side, that the devise of the residue of the testator's real estates, after his daughter's death, to her second and other younger children, gave them vested interests; that there was no gift over, except in the event of all these children dying under the age of twenty-one and unmarried; that that event had not happened, for some of them had attained twenty-one; and, therefore, that the interest which vested in them was never devested. Skey *v.* Barnes, 3 Mer. 335. The clauses, which related to the marriage of the younger children under twenty-one, and to their death under twenty-one without having been married with the required consent, were, at the utmost, equivalent only to directions, that the shares should not be transferred to the children respectively, until they attained twenty-one or married with the consent of

both parents or the survivor duly given; and it is settled that, where there is an antecedent gift, a direction not to pay or transfer the property to the legatee or devisee till he attains a particular age, or till a particular event happens, will not postpone the vesting. Leake *v.* Robinson, 2 Mer. 363.

On the contrary, it was contended, on behalf of the surviving children, that it was apparent on the whole context of the will, that a child was not to participate in the devise, till marriage under twenty-one without due consent was impossible, in other words, till the child had either married with consent or attained twenty-one; and this intention could not be effected, unless the vesting of the shares was postponed.

May 24.—The MASTER of the ROLLS. As to the first point, the testator certainly had not in his contemplation a second marriage of his daughter; but still his plain purpose being to provide for all the children of his daughter, and the limitation over being "in case his daughter should die leaving no issue behind her," I am of opinion that the gift in the will must be construed to extend to children of the second marriage.

With respect to the second point, the children would plainly take an immediate vested interest by the expression of the gift to them as tenants in common, if a different intention did not appear from the subsequent parts of the will. The testator proceeds to make a gift over, in case all the children should die under twenty-one, and not married under that age with the consent of his son and daughter; and he afterwards adds, "my will and meaning is, that my said son and daughter, or the survivor of them, shall be subscribing witnesses or witness at the wedding of such child or children that shall so marry before his, her or their respective age or ages of twenty-one years, otherwise such child or children shall not receive any benefit from the will." It necessarily follows, that such child would not take a previous vested interest, because, from such interest, the child would be entitled to maintenance, and would take a benefit under the will. And if a consent is necessary to give a vested interest to a child marrying under twenty-one, it is clear that the testator did not intend that the children should take a vested interest by the first gift to them as tenants in common; and the attaining twenty-one must be as necessary to give them a vested interest, as the marriage with consent under that age. I am of opinion, therefore, that the younger children, who attained twenty-one, take the real estates equally between them as tenants in common.

Earle *v.* Pickin.

Russell and Mylne, 547.

Where the question in the cause turned upon the fact of notice of a settlement, and the names of the witnesses, and the particular facts of notice were not stated in the bill, so that the defendant had no opportunity to meet their testimony, an inquiry as to the fact of notice was directed before the Master.

On appeal the decree was varied by directing an issue to try whether the circumstances relied upon to prove the notice took place prior to a stated day, after which notice would be immaterial.

Whether the court will, under special circumstances, direct witnesses examined in the cause, to be examined to the same points before the Master, *quære*.

Rolls.—May 24, 1830. L. C., July 25, August 6, 1831.

THE bill was filed by children who claimed to be entitled to a sum of 2000*l.* charged upon a real estate by the marriage settlement of their father.

The defendant was the purchaser of the estate from the father; and the only question in the cause was, whether, at the time of the purchase and payment of the price, which took place on the 29th of September 1818, the defendant had notice of the settlement.

The bill alleged that the defendant had notice of the charge before he completed his purchase. Two witnesses of the names of Bishton and Wright swore that he had admitted that he had had notice; and one of them deposed to a conversation with him, which amounted to notice, and from which it appeared, that before making the purchase, the defendant had consulted a Mr Smith, a solicitor, on the subject of a supposed charge on the estate.

Mr Pemberton and Mr Wakefield, for the plaintiffs, argued, that on this evidence they were entitled to a decree.

Mr Bickersteth and Mr Rolfe, contrà.

The defendant ought not to be concluded by evidence, which it was impossible for him to meet. He could not prove a general negative, that he never had notice; and he had no information concerning the particular facts of notice on which the plaintiffs meant to rely. The bill ought to have stated those particular facts, and the defendant would then have been prepared to disprove them. If, for instance, the conversation, to which one of the witnesses deposes, had been stated in the bill, the defendant could have shown, as the fact really was, that the conversation took place, not before, but after the completion of the purchase. As to the defendant's admissions of having notice, which the witnesses had proved, the rule of pleading was, that a party could not rely on an admission made by his adversary, not appearing in the pleadings, unless it were put in issue, so that he whom it was sought to bind by it, might either disprove it or explain it. In the present case, as the bill made no mention of any particular facts of notice, or of the alleged admissions of notice, an inquiry ought to be directed, so as to give the defendant an opportunity of meeting a case which had been opened against him by surprise.

[Earle *v.* Pickin.]

Mr Pemberton, in reply, denied that any such rules of pleading existed as those on which the argument for the defendant was founded; and contended, that to direct an inquiry in the present stage of the proceeding, would be to throw, undeservedly, discredit on the witnesses who had been examined, and to hold out to a defendant great opportunities and temptation to tamper with evidence.

The Master of the Rolls, after some hesitation, made the following order:—"It appearing that neither the names of the witnesses who have deposed to the notice, nor the particular facts of notice were stated in the bill, refer it to the Master to inquire, whether, at or before the time the purchase was completed, the defendant had notice of the settlement by which the charge of 2000*l.* was created, with liberty to the Master to state any circumstances specially at the request of either party."

The Master of the Rolls stated, that he made the order in this special form, lest he should appear to throw discredit upon the witnesses by directing the inquiry.

July 25, 1831.—The plaintiffs appealed from his honour's decree.

The Solicitor-General (sir W. Horne) and Mr Wakefield, for the appellants, contended that the evidence, if believed (and no attempt had been made to discredit it), fully established the case made by the bill. The fact of notice, upon which the whole question turned, was distinctly put in issue, and was satisfactorily proved by the evidence of several witnesses, swearing to conversations which took place with the defendant anterior to the date of his purchase, and from which his knowledge of the charge on the estate, and of the consequent defect in the title, was clearly to be collected.

The judgment of the court below proceeded, in part, upon the ground, that the bill did not state the names of the individuals by whose testimony the fact of notice was to be proved; but the doctrine of his honour in that respect was supported by no authority, and, if adopted, might lead to great mischief, by holding out to defendants the temptation and opportunity to tamper with their adversaries' witnesses. For that very reason, indeed, the court had laid down a rule which would render the inquiry directed by this decree entirely nugatory: for it was settled in practice, that the same witnesses who had been examined in the cause, could not be again examined to the same points before the Master; and how, then, could the plaintiffs establish their case?

Sir E. Sugden and Mr Rolfe, for the defendant.

The Lord Chancellor. The evidence contained in the depositions would certainly, if believed in its fullest extent, dispose of the whole case, not only as to the substance of the transactions, but as to the time when they are alleged to have taken place. The only question is, whether there is not some error with respect to the date; and I have a vehement suspicion that there is such an error; not so much in consequence of false swearing, however, which is hardly to be apprehended, as of mistake, which, upon comparing the facts stated in the answer with the depositions, appears very possible; and that possibility fully justified his honour in sending the matter to be further inquired into.

It was asked why the defendant did not produce Smith as a witness,

inasmuch as his evidence would have been material to rebut the alleged notice, and the conversation might be the same to which Bishton and Wright in their depositions refer. But the answer is obvious. It might be perfectly true that this conversation took place in 1820; but that did not prove that notice was not given in 1818; and no man in his senses would attempt to rebut evidence of the nature of which he had no knowledge; no man would ever dream of calling Smith as a witness, to prove that which might be perfectly true, but which could not be rationally supposed to be in the least degree material. The moment the defendant is apprized, however, that evidence has been given of a conversation alleged to have taken place in 1818, and that Smith was referred to in that conversation, the case is altered; and it becomes most important to settle the date of the conversation, as the whole then turns upon whether it took place before or after the year 1818. If Smith comes forward to say he was consulted in 1820, but never before that time, there is at once an end of the plaintiffs' case. If he says the contrary, there is an end of the defendant's. Shall I, then, by reversing the decree which directs these inquiries to be made, shut out the light which will be decisive of the merits on both sides?

His honour sent it to the Master in preference to directing an issue; and I incline to think he was right in so doing, because a court of law would of necessity be confined to legal notice, to which only a jury could look. If any issue were to be directed, it should be to ascertain what was the date of the conversations.

I shall therefore send it to the Master, with a direction that he shall be at liberty to examine the witnesses already examined, and to the same points; a course which will not affect the question of costs, since, looking to the circumstances of the case, even if I affirmed the decree *totidem verbis*, I should affirm it without costs.

August 6.—The cause was afterwards brought on again upon a motion to vary the minutes, by striking out the direction in the decree, that the witnesses examined in the cause might be examined to the same points before the Master, and substituting a direction for the trial of an issue to ascertain the date of the conversations.

Mr Wakefield, for the motion, insisted that the direction in the decree, with respect to the examination of the witnesses, was a violation of the settled principles and practice of the court, and would be pregnant with consequences most dangerous to justice. In support of these positions he referred to the following cases. Browning *v.* Barton, 2 Dick. 508; Sawyer *v.* Bowyer, 2 Dick. 639, 1 Bro. C. C. 388; Vaughan *v.* Lloyd, 1 Cox, 312; Smith *v.* Althus, 11 Ves. 564; Birch *v.* Walker, 2 Sch. & L. 518; Willan *v.* Willan, Coop. 219, 19 Ves. 590; Smith *v.* Graham, 2 Swan. 264(*a*).

Mr Rolfe opposed the application.

The Lord Chancellor ultimately ordered that the decree should be varied, by directing the parties to proceed to a trial at law upon the following issue—whether the conversations in the depositions mentioned,

(*a*) Where these and some other cases upon the subject are collected. See also Swinford *v* Horne, 5 Mad. 379.

between the defendant and the witness Bishton, and between the defendant and the witness Wright, took place before the 29th day of September 1818, with liberty to indorse special matter.

Reg. Lib. A. 3095.

Tilson *v.* Jones. Tilson *v.* Thornton.

Russell and Mylne, 553.

Whether the expression in a will, "in case of death," refers to a death in the lifetime of the testatrix, or to a death at any time, depends upon the context.

Rolls.—May 26, 1830.

THE testatrix, Catherine Tilson, in her will gave as follows: "I direct the interest of 131*l.* 5*s.* four per cent bank annuities, and 40*l.* three and a half per cent bank annuities, now standing in my name in the books of the governor and company of the Bank of England, and the interest of my one hundred pounds' share in the Coventry canal, to be equally divided between my son John Samuel Tilson and my daughter Catherine Tilson, exclusive of any husband with whom she may happen to intermarry, and without being subject to his debts; and in case of the death of either of them my said son and daughter, then I give the whole of my interest to the survivor of them: and if my son John Samuel Tilson shall not be in England at the time of my decease, then the execution of the trusts, so far only as they relate to him, shall be postponed until after his return: but in case of his death, then the said John Jones shall pay the whole of such interest to my daughter Catherine Tilson; and in case of her death, I give the whole of such principal and interest to be equally divided between my niece Ann Fitzpatrick Thornton and my nephew Alfred Barns; and in case of their death before my son John Samuel Tilson and my daughter Catherine Tilson, then I give the whole thereof, principal and interest, at the deaths of John Samuel Tilson and Catherine Tilson, to my god-daughter Catherine Mary Jones, daughter of my executor John Jones."

Catherine Tilson survived her brother, and the question in the cause was, whether she took the stock and canal share absolutely or only for life?

Mr Bickersteth contended that the testatrix had given only the interest, and not the corpus of the property, to her son and daughter; that they, as between themselves, had the benefit of survivorship; that, after the death of both, the intention of the testatrix was, that the fund should go to the persons whom she had marked out; and, therefore, that Catherine Tilson took only a life interest in this property.

Mr Pemberton, contrà, argued that a gift of the interest is sufficient to carry the principal; that the words "in case of her death" referred more properly to a contingent than to a certain event, that is, to the death of the daughter in the lifetime of the testatrix, which might or might not happen, rather than to the death of the daughter at any time, which could not but happen; and, therefore, that, as Catherine Tilson survived her

brother, she took the property absolutely, and there was a failure of all the limitations after the gift to her.

The MASTER of the ROLLS. The gift over is in the first place to the testatrix's niece Ann Fitzpatrick Thornton, and her nephew Alfred Barns; and in case of their deaths before her son and daughter, then to her god-daughter Catherine Mary Jones. The testatrix must be understood here as if she had expressed herself thus: "I give the principal and interest to Ann Fitzpatrick Thornton and Alfred Barns, if they shall survive my son and daughter; and if they shall not survive them, then to Catherine Mary Jones." She could not refer here to the death of her son and daughter in her lifetime; Catherine Tilson, therefore, takes for life only. Besides this, the testatrix, in her gift to her son and daughter, speaks of the interest only; but in the gift over she speaks of the principal and interest.

Mills *v.* Robarts.

Russell and Mylne, 555.

Where a testator gives legacies to children, provided they attain twenty-one, with a gift over if the children die before twenty-one, and appoints trustees and guardians to the children, with a request that they will attend to their education, the children are entitled to the interest of their legacies for their maintenance and education, until they attain twenty-one or die under that age.

Rolls.—May 26, 1830.

GEORGE JAMES ROBARTS by his last will, after bequeathing a legacy to Mary Ann Harben, and giving to Charles Mills and Abraham Wildey Robarts a sum of 8000*l.* in trust, to pay to her the interest during her life, referred to a settlement which he had previously made of 10,000*l.* three per cent consolidated bank annuities for the benefit of Mary Ann Harben during her life, and then proceeded in the following words:

"I do will and bequeath this said sum of 10,000*l.* three per cent consols, after the decease of Mary Ann Harben, to be equally divided between her two children hereafter named: viz. Georgiana Charlotte Harben Robarts, and her infant brother not yet baptized, but whom I purpose to name James George Harben Robarts, for their joint use and benefit for ever. In the event of the said children dying before they attain the age of twenty-one years, I then will and bequeath the said 10,000*l.* three per cent consols to the survivor; or in case they both die before they attain the age of twenty-one years, I then will and bequeath the said 10,000*l.* three per cent consols to my nephew Harry Robarts and his heirs for ever. In like manner I will and bequeath to my two children, Georgiana Charlotte Harben Robarts and James George Harben Robarts, after the decease of their mother Mary Ann Harben, in equal proportions, the sum of 8000*l.* before named in this my will and testament, subject to the same provision as is directed in the above paragraph; viz. in the event of the said children dying before they attain twenty-one years of age, I then will and bequeath the said sum of 8000*l.* to my nephew Harry Robarts and

[Mills v. Robarts.]

his heirs for ever."—"I will and bequeath," continued the testator in a subsequent part of his will, "to my daughter Georgiana Charlotte Harben Robarts, daughter also of the above-named Mary Ann Harben, the sum of 10,000*l.* sterling for her own absolute use and benefit, provided she attains the age of twenty-one years; in default of this, I will and bequeath the said 10,000*l.* sterling to her brother James George Harben Robarts, provided also he attains the age of twenty-one years; but in default of this, I will and bequeath the said 10,000*l.* to my nephew Harry Robarts and his heirs for ever. I will and bequeath to James George Harben Robarts the sum of 10,000*l.* sterling for his own absolute use and benefit, provided he attains the age of twenty-one years; but in default thereof, I will and bequeath the said 10,000*l.* sterling to his sister Georgiana Charlotte Harben Robarts; but in the event of one or both of them dying before they attain the age of twenty-one years, I then will and bequeath the said 10,000*l.* to my nephew Harry Robarts and his heirs for ever. I will and bequeath that the legacy duty on the legacies bequeathed to Georgiana Charlotte Harben Robarts and James George Harben Robarts, be paid by my executors out of the residue of my property. I will and bequeath to George Francis Stuart the sum of 10,000*l.* sterling for his sole use and absolute disposal, provided he attains the age of twenty-one years; but in default thereof, I then will and bequeath the said 10,000*l.* to my nephew Harry Robarts and his heirs for ever. I constitute and appoint my brother Abraham Wildey Robarts, and my much esteemed friend Charles Mills, Jun., of Birchin Lane, trustees and guardians to the several persons before named in this my last will and testament: and I earnestly implore and request that they would have the goodness to act, and to attend particularly to the education and well being of Georgiana Charlotte Harben Robarts, and see that she is properly and virtuously brought up and educated: and I further will and direct that the said Georgiana Charlotte Harben Robarts is on no account to dispose of herself in marriage without the previous consent of her guardians, either before or after she attains twenty-one years of age, on pain of forfeiting two-thirds of the value of the legacies bequeathed to her in this my will. I earnestly recommend the said Georgiana Charlotte Harben Robarts and her brother to the favourable notice of my mother, sisters and family in general; and I hope and trust, they will have some feeling consideration for the circumstances of their birth, and to do all in their power to make them respectable and happy in life." The testator concluded his will by bequeathing the residue of his property to his brothers and sisters, and appointing Charles Mills and Abraham Wildey Robarts his executors.

The bill was filed by one of the executors; and the question in the cause was, whether the two children, Georgiana Charlotte Harben Robarts and James George Harben Robarts, were entitled to interest on their legacies of 10,000*l.* each for their maintenance and education during their minorities.

Mr J. Russell, for the plaintiff.

Mr Pemberton and Mr Roots, for the children of Mary Ann Harben.

Though the legacies are given to the children, only provided they respectively attain the age of twenty-one, the testator has placed himself in *loco parentis* towards these children, and they are entitled to the interest of the money for their support and maintenance. Inchedon *v.* Northcote, 3 Atk. 430—438; Acherley *v.* Vernon, 1 P. Wms, 783. These two

children have no immediate provision, except the legacies in question. What, then, did the testator mean by appointing Mr Robarts and Mr Mills trustees and guardians to them, and requesting those gentlemen to take care of their education? They could be trustees only of the legacies, and it was only out of the interest of the legacies that the expense of the education of the legatees could be defrayed. The testator, therefore, must have meant to postpone the possession, and not the vesting of the legacies. Branstrom *v.* Wilkinson, 7 Ves. 421.

Mr Tinney and Mr Rolfe, for the residuary legatees.

These legacies are expressly given only on condition that the legatees attain twenty-one; if they do not attain that age, there is no bequest to them, and all that was intended for them goes over to other persons. How, then, can they be entitled to any benefit from this bequest, until the annexed condition is fulfilled? In Branstrom *v.* Wilkinson the legacy was given, *when* the child attained twenty-one; and the father of the legatee was appointed trustee of the legacy during her minority. The word "when" is not so strong as the word "provided;" and, though in the present case trustees are appointed, yet the trust is not expressly referred to the legacies of 10,000*l.* The testator seems to have used the words "trustees" and "guardians" as synonymous. His object was to appoint guardians for these illegitimate children, who might superintend their education; that was a purpose which he could not legally effect, and it is difficult to conceive how the use of this vague term can control the clear unequivocal import of the words of direct bequest. The testator had made a large provision for the mother; and, upon her death, the principal, amounting to 18,000*l.* consols, was to go to the children. The children might, during their minority, become entitled to this property; and, therefore, the appointment of trustees was not superfluous.

The Master of the Rolls. The testator appoints two gentlemen to be trustees and guardians of these children, and requests them to attend to their education; and the case of Branstrom *v.* Wilkinson is an authority directly in point, that they are entitled to the interest of the sums given to them until they attain twenty-one, or die under that age. The same principle applies to the legacy given to George Francis Stuart.

Cooper *v.* Reilly.

Russell and Mylne, 560.

THE court will not appoint a receiver of the annual allowance paid to the assistant parliamentary counsel to the lords of the treasury, before the hearing. Whether that allowance be assignable, *quære?*

March 1830.

Ex parte Clarke.

Russell and Mylne, 563.

AN ex parte order of commitment for a contempt is not irregular, because it has been granted absolutely in the first instance, although the person guilty of the contempt is not a party in a cause.

The court will stay proceedings in an action against its officers, where the question to be tried is, how far they have conducted themselves with propriety in the execution of its orders.

Whether the court will make an ex parte order, that a person guilty of a contempt shall stand absolutely committed, upon the testimony of a single witness, *quære?*

May 15, 1830.

Welby *v.* Rockcliffe.

Russell and Mylne, 571.

A testator devises lands to R. in fee, and reciting that he has executed a bond for the due payment of a certain annuity, he charges the lands so devised, and also the said R., his heirs, executors and administrators, with the payment of that annuity; he then gives divers pecuniary legacies, and directs the residue of his personal estate to be divided equally between R. and W.: Held, that the annuity is primarily a charge upon the lands devised, and upon R. personally, in exoneration of the personal estate.

June 12, 15, L. C., 1830.

THOMAS BROWN, by will duly executed and attested, after directing that his just debts should be paid, devised all his messuages, cottages, closes, lands, &c. lying in the parish of Wilsford, unto Thomas Rockcliffe the younger, in fee; and he devised all his messuages, closes and lands, lying in Willoughby, unto John Welby in fee. The will then recited that, by an obligation made on his marriage, the testator had bound himself, his heirs, executors and administrators, in the penal sum of 4000*l.* in order to secure the payment of an annuity of 200*l.* to his wife, Leonora Brown, in the event of her surviving him, and proceeded in these words: "Now I do hereby charge and make chargeable all and singular my said messuages, cottages, closes, lands, &c. in Wilsford aforesaid, and hereinbefore devised to the said Thomas Rockcliffe the younger, his heirs and assigns; and also the said Thomas Rockcliffe, his heirs, executors, administrators and every of them, to and with the payment of the said annuity or yearly sum of 200*l.* in case the said Leonora Brown shall be living at the time of my decease." The will also bequeathed a number of pecuniary legacies to different persons, and gave all the rest and residue of the testator's personal estate and effects to Thomas Rockcliffe the younger, for his own use absolutely.

By a codicil the testator revoked the residuary bequest contained in his

will, and directed that the residue should be divided in equal moieties between the said Thomas Rockcliffe the younger, and the said John Welby.

Leonora Brown survived her husband; and the only question in the cause was, whether her annuity was charged on the Wilsford estate in exoneration of the personalty; or whether it was to be paid in the first instance out of the residue?

The cause was heard as a short cause before lord Gifford at the Rolls. His lordship decided that the annuity given to Leonard Brown was, as between John Welby and Thomas Rockcliffe, charged by the testator's will and codicil upon the real estate at Wilsford, and upon Thomas Rockcliffe personally in exoneration of the testator's personal estate; and that Thomas Rockcliffe, therefore, was bound to elect whether he would renounce all benefit under the will and codicil, or provide a proper security for the due payment of the annuity.

Thomas Rockcliffe appealed from that decision.

Sir Edward Sugden and Mr Koe, for the appellant, contended that there was nothing on the face of this will indicating that the burthen was to fall primarily (which would in effect be exclusively) upon Thomas Rockcliffe. On the contrary, the testator's intention, as far as it could be collected, was to place the two principal devisees upon the same footing; an intention which would be entirely frustrated, if lord Gifford's decree were allowed to stand. In order to exempt the personal estate from the payment of debts, it was not enough for a testator to impose them as an express charge upon his real estate; he must also, in direct terms, or by language raising a necessary implication, exonerate his personal estate, the natural fund out of which they were otherwise to be satisfied. The judgment of sir William Grant, in Watson *v.* Brickwood, 9 Ves. 447, established as a principle, that the most anxious provisions, prescribing the manner and proportions in which a charge is to be borne by the devisees of real estate, are insufficient to render that estate liable in the first instance; because all such provisions are considered as introduced prospectively only, in case the land shall become ultimately chargeable, and not for the purpose of making it chargeable at all events. That case indeed was much stronger than the present, for the gift of the personalty was of a specific sum, whereas here it was merely of a residue. The principles laid down in Watson *v.* Brickwood were afterwards recognized and approved by lord Eldon in Bootle *v.* Blundell, 1 Mer. 193, 19 Ves. 509, and have been uniformly adhered to ever since.

Mr Pepys and Mr Cockerell, contrà, argued, that to exonerate the personal estate, no technical form of words was requisite, provided such an intention could be fairly collected from the language employed by the testator. It was sufficient if the context of the will, and the circumstances appearing on the face of it, manifested that intention in a way to satisfy the mind of the particular judge by whom the question was to be decided; Bootle *v.* Blundell, 1 Mer. 193, 19 Ves. 509; Browne *v.* Groombridge, 4 Mad. 495. With this view the two instruments, the will and codicil, ought to be considered in connexion. By the former, the charge was imposed upon the Wilsford estate, for the very purpose of securing the regular payment of the debt constituted by the annuity, without trenching upon the fund devoted to the pecuniary legacies; and although it was thus thrown primarily on the property devised to Rockcliffe, his interest did not thereby suffer, since whatever surplus might remain, after satisfy-

ing the debts and legacies, he would still take as residuary legatee. If, however, any doubt could remain upon the first part of the will, it was removed by the subsequent clause, in which the annuity, previously charged upon the land, was moreover charged personally upon Thomas Rockcliffe, his heirs, executors and administrators. The payment of the debt was thus made the express condition of the bounty ; and, upon the ordinary principles of election, therefore, the defendant could claim no benefit under the will, unless he submitted to comply with all its requisitions. The codicil, by which one half of the residue was withdrawn from Rockcliffe and given to the plaintiff, could not vary the construction to be put upon the will ; for it left the clause charging the Wilsford estate exactly as it stood before, and made no provision for relieving the devisee from any portion of the burthen.

Sir Edward Sugden, in reply.

June 15.—The Lord Chancellor, after stating the material parts of the will and codicil, observed, that the effect of the two instruments taken together was, to devise the estate of Wilsford to Thomas Rockcliffe in fee, and that of Willoughby to John Welby in fee, and subject to the pecuniary legacies, to give the personal property in equal moieties between the two ; and, at the same time, to charge the estate of Wilsford, and Thomas Rockcliffe the devisee of that estate, personally, with the payment of the annuity in question. His lordship was of opinion that, under these circumstances, it was the manifest intention of the testator, that the owner of the Wilsford estate should be primarily charged with the burthen ; and he saw no ground whatever, therefore, for altering the judgment of lord Gifford.

Ex parte Swift, in the Matter of Swift.

Russell and Mylne, 575.

ORDER made upon petition, that part of a small sum of stock bequeathed to an infant, should be sold, and the proceeds applied in paying a debt incurred for necessaries on his account, and that the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance(*a*).

August 4, 1828. V. C.

(*a*) Ex parte Knott, in the Matter of England, ante, p. 530.

Ex parte Chambers, in the Matter of Chambers.

Russell and Mylne, 577.

ORDER made upon petition, that executors should be at liberty to apply certain small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, education and advancement, though the shares did not vest till the children came of age.

June 18, 1829. L. C.

Bagley *v.* Mollard.

Russell and Mylne, 581.

Wherever the general description of children in a will would include legitimate children, it cannot also be extended to illegitimate children.

A testator devised a leasehold in trust for his "grandchild, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal shares; Elizabeth was illegitimate, and William had no other child:

Held, that Elizabeth did not take any share of the residue.

Rolls.—May 26, June 12, 1830.

THE will of John Mollard, dated in 1810, contained, among other bequests, the following:—"I give and bequeath unto my son, James Mollard, his executors and administrators, all that my other messuage, tenement, or dwelling-house and premises, with their appurtenances, at Knightsbridge aforesaid, and held by me under the said lease, and now let to Richard Davis, bricklayer; to hold to my son, James Mollard, his executors or administrators, for and during all the remainder of my term, estate and interest therein; in trust, nevertheless, that he, my said son James Mollard, his executors or administrators, do and shall, from the quarter day next after my decease, receive and take the rent thereof, and, after and subject to the paying the proportionable part of the reserved rent to the ground landlord thereof, fine and fees of renewal, and charges and expenses of keeping the said premises in tenantable repair, pay, apply, and dispose of the net clear surplus or residue of such rent, or any improved rent thereof, for and towards the support and maintenance of my grandchild, Elizabeth Mollard, the now only surviving child of my son, William Mollard, until she shall attain the age of twenty-one years, or day of marriage; such marriage being with the privity and consent of my said son, James Mollard, his executors or administrators, and not otherwise; when I give and bequeath the then term of years, estate, and interest in my said lease, or any renewed lease thereof, and the renewed lease thereof, and the messuage and premises thereby demised, unto my said granddaughter, the said Elizabeth Mollard, her executors, administrators and

assigns (subject as aforesaid), she or they giving and executing to my executors a release and discharge on giving up the possession thereof; when I will, order, and direct the said James Mollard, his executors or administrators, to assign such lease and premises unto my said granddaughter, or as she, in case of her marriage with such consent as aforesaid, shall then direct or appoint, but for her own sole use and benefit." He disposed of the residue of his estate in the following words:—"And as to all the rest, residue, and remainder of my real estate, whether in possession, remainder or expectancy, I give and devise the same unto my said wife, Elizabeth Mollard, and her assigns, for and during the term of her life; and from and after her decease, then I give and bequeath the same, together with the general residue of my leasehold and personal estate, chattels, and other effects whatsoever and wheresoever, moneys, and securities for money, and debts of every kind, not hereinbefore by me given and bequeathed absolutely or in trust in manner aforesaid, to and for the sole use and behoof and benefit of my said daughter, Mary Bagley, to hold to her and her assigns for and during her life; and from and after her decease, I give, devise, and bequeath the same and every part thereof, according to the tenor of such estate, and my term, estate, and then interest therein unto, among, and between all and every the children of my said son, James Mollard, William Mollard and Mary Bagley, as shall be then living, and to receive and take the same as tenants in common, and not as joint tenants, their heirs, executors, administrators and assigns; and I hereby nominate and appoint my said son, James Mollard, and Robert Bagley guardians to all and every my said grandchildren during their respective minorities, or until their marriages with such consent as aforesaid."

The testator died in 1811, leaving two sons, James Mollard and William Mollard, and one daughter, Mary Bagley, him surviving.

Elizabeth Mollard, named in the will, was an illegitimate child of William. In 1794, after her birth, he intermarried with her mother, and had subsequently two sons, both of whom died in 1810. He never had any other legitimate issue. James Mollard, the son, had three illegitimate children, but no legitimate issue.

The question in the cause was, whether Elizabeth Mollard was entitled to a share of the residue.

Mr Bethel, for Mary Bagley and her children.

"Children" in the residuary gift must be construed legitimate children; and the circumstance that there are no legitimate children of William cannot vary the construction. Godfrey *v.* Davis, 6 Ves. 43; Cartwright *v.* Vawdry, 5 Ves. 530; Kenebel *v.* Scrafton, 2 East, 530; Swaine *v.* Kennerley, 1 Ves. & B. 469. If William had legitimate children, they would unquestionably be the persons to take; and no instance can be found in which legitimate and illegitimate children have taken under the same description. "It was argued with great force," says lord Eldon, in Wilkinson *v.* Adam, 1 Ves. & B. 468, "that if this testator had lived until the death of his wife, as he did, and had afterwards married Ann Lewis, and had legitimate children by her, those children must have taken; and legitimate and illegitimate children cannot both take under the same description: and it would be very difficult to persuade me that they can." If an illegitimate child of William is entitled under this residuary bequest, why should it not also include illegitimate children of James and Mary?

In Wilkinson *v.* Adam, the children, in whose favour the devises were made, were in substance, though not in name, described in the will as illegitimate: and so unequivocal was the description, that lord Eldon observes, 1 Ves. & B. 469, "it is impossible that he could mean any thing but illegitimate children." Here Elizabeth Mollard is not described as illegitimate; and there is no allusion in the will to any circumstance which could even suggest the notion of illegitimacy.

Mr Girdlestone, Jun., for Elizabeth Mollard.

In Wilkinson *v.* Adam, it was held, that under a devise to the children whom the testator might have by Ann Lewis, who was not his wife, three natural children of Ann Lewis, who, at the date of the will, had acquired the reputation of being the testator's, would take: and the ground of the decision was, that it appeared from the contents of the will, that illegitimate children were the objects of the testator's bounty. In the present case, Elizabeth Mollard is described as the grand-child of the testator, and the only surviving child of William; and the testator must have meant to include her among the children of his sons James and William. To exclude her from taking a share of the residue as a child of William, is to refuse to her the character which the will expressly gives her. It has never been decided, that legitimate and illegitimate children can in no case take together under the description of children; and, in Wilkinson *v.* Adam, the three common law judges inclined strongly to the opposite opinion.

Mr Girdlestone, Sen., for other defendants.

June 12.—The Master of the Rolls. The testator, John Mollard, having three children living, namely, James Mollard, William Mollard, and Mary Bagley, bequeathed a leasehold house to his son James Mollard, in trust for his grandchild Elizabeth Mollard, whom he described as the then only surviving child of his son William Mollard; and he concluded his will by a residuary bequest to all and every the children of his sons James Mollard, William Mollard and his daughter Sarah Bagley. Elizabeth Mollard, the grandchild, was illegitimate; and the question in the cause is, whether she was entitled to a share under the residuary gift?

In the case of Wilkinson *v.* Adam, the common law judges, who assisted lord Eldon, seem to have entertained an opinion that illegitimate children, who were described in the will, might take jointly with legitimate children, under the general description of children; but lord Eldon was plainly not of that opinion; and I entirely concur with him in thinking, that whenever the general description of children will include legitimate children, it cannot also be extended to illegitimate children. In Wilkinson *v.* Adam, the illegitimate children were described to be illegitimate in the will, which is not the case with respect to Elizabeth Mollard. But I am of opinion that this circumstance makes no difference in the case.

I must declare that Elizabeth Mollard is not entitled to a share of the residue. Harris *v.* Lloyd, 1 Turn. & Russ. 310.

Saberton *v.* Skeels.

Russell and Mylne, 587.

The words "personal representatives," are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will.

June 12, 1830.

THE testator, Thomas Skeels, by his will gave to each of his daughters the sum of 1000*l.*, which he directed to be settled in manner thereinafter mentioned; and he then directed the settlement in the following words: "And as to the said several sums of 1000*l.* so to be settled, I do hereby direct that each sum of 1000*l.* so belonging to each be invested in the funds, in the names of my said trustees and the daughter entitled to the same, or shall, in the same names, be put out on real security, the interest thereof to be paid to the daughter entitled to the same, for which her receipt alone shall be sufficient, and which shall not be subject to the debts or control of any husband she may have, and shall, after her death, pass and be subject according to any will or disposition she may under her hand and seal make thereof, and for want thereof shall go to her personal representatives; and if the daughter so entitled to the said sum of 1000*l.* shall at any time choose to sink the same, or any part or parts thereof in the purchase of one or more annuities for her own life, in like manner payable to her for her sole use, and not subject to the debts of her husband, my said trustees, together with such daughter, are hereby authorized and required to invest the same accordingly on government or good real security, but not otherwise."

The plaintiff was the husband of one of the daughters, who had died leaving children; and the wife having made no appointment of the 1000*l.* by will or otherwise, the plaintiff took out administration to her, and claimed to be entitled to the 1000*l.*

Mr Tinney, Mr Preston and Mr Cockerell, for the plaintiff.
Mr Lynch, for the children.
Mr Bickersteth, for other defendants.

The argument for the plaintiff was, that "personal representatives" was synonymous with "executors and administrators," and gave the daughter an absolute interest; that this interest was not displaced by the power of appointment, which had not been exercised; and, consequently, that the husband was entitled as administrator to his wife: or, if it should be held that the personal representatives of the wife were to take as purchasers, the husband alone sustained the character of personal representative; in that character he would take the fund as a purchaser; and there was no principle of law on which he could be held to be a trustee for the children.

On behalf of the children, it was argued, contrà, that the words could not be considered to vest in the wife an absolute interest in the fund, because such an interest was inconsistent with the total exclusion of the marital right of the husband; that the express authority given to the wife to sink the principal in the purchase of an annuity for her life would have been unnecessary, if the corpus of the legacy had vested in her absolutely;

that the legacy being given to the separate use of the wife for life, remainder to such person as she might appoint, remainder to her personal representatives, whoever took as personal representative, could take only as a purchaser; that there was a manifest intention to exclude the husband; and that the next of kin must have been those whom the testator meant to designate by the words "personal representatives."

The following authorities were cited: Price *v.* Strange, 6 Mad. 159; Evans *v.* Charles, 1 Anst. 128; Bridge *v.* Abbot, 3 Bro. C. C. 224; Jennings *v.* Gallimore, 3 Ves. 146; Long *v.* Blackall, 3 Ves. 486; Anderson *v.* Dawson, 15 Ves. 532; Bailey *v.* Wright, 18 Ves. 49; Ripley *v.* Waterworth, 7 Ves. 425; Wellman *v.* Bowring, 2 Russ. 374; Garrick *v.* Lord Camden, 14 Ves. 372.

The MASTER of the ROLLS. All words are to be understood in their ordinary sense, unless controlled by the context of the will. The ordinary sense of the words "personal representatives" is, executors and administrators; and the substitution of these words for "personal representatives" would vest an absolute interest in the wife. I find in this will nothing to control this ordinary sense: on the contrary, it is fortified by the power given to invest the 1000*l.* in the purchase of an annuity for the life of the wife, which manifests that she was the sole object of the testator's intention; and the interest thus vested in the wife belongs to the plaintiff, as her husband and administrator.

Wilson *v.* Halliley.

Russell and Mylne, 590.

Whether a sum directed to be raised out of the rents and profits of a real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention, to be collected from the context of the will, and from the purposes to which the money is to be applied.

Rolls—June 12, 14, 1830.

THE will of the testator, Benjamin Wilson, contained, *inter alia*, the following bequests:—"I give, devise and bequeath unto my good friends Richard Tinker, John Halliley and Thomas Todd, whom I hereby appoint joint executors of this my will, and their heirs, upon the trusts nevertheless, and to and for the ends and purposes hereinafter expressed and declared, that is to say, upon trust that they, the said John Halliley, and Richard Tinker, and Thomas Todd, or the survivors or survivor of them, or the heirs of such survivor, shall, and do, as soon as conveniently may be after my decease, dispose of, collect, get in, and convert into money, all my personal estate and effects; and also shall and do, at such time as to them or him shall seem most proper, sell and dispose of all and every my shares, estate, and interest in the Huddersfield canal for the best and utmost price that can be had or gotten for the same, and on payment of the purchase-money, to sign and give proper, valid and effectual receipts, and other discharges and acquittances for the same; and by all lawful ways and means, to convey the said shares, estate and interest unto the purchaser or purchasers thereof, and with and out of the moneys to arise and be gotten in, by the means aforesaid or otherwise, under or by virtue

of this my will, and the rents, issues, and profits of my said real estates, and every of them, and every part thereof, in trust, in the first place, to pay the said legacy or sum of 50*l.* by me hereinbefore given to my said wife; and the said annuity or yearly rent charge of 100*l.* or 50*l.*, as the case may be, to her and her assigns for and during the term of her natural life; and, in the next place, to pay and satisfy my funeral expenses, and all such debts as shall be due and owing by me to any person or persons whomsoever, by specialty, simple contract, or otherwise howsoever, at the time of my decease, or which shall afterwards become due, and the interest of such of the said debts as shall carry interest; and, in the next place, to levy and raise out of the rents and profits of my said real estate the sum of 5850*l.*, and place the same out at interest on some eligible security or securities, and pay the interest or proceeds of the sum of 1000*l.*, part thereof, when and as the same shall be received, unto my brother Joseph Wilson, and his assigns, for and during the term of his natural life; and as soon as conveniently may be after his death, to call in the sum of 1000*l.*, part of the said principal sum of 5850*l.*, and pay the sum of 200*l.* out of the same unto my nephew Thomas, son of my said brother Joseph, and the remaining 800*l.* unto and equally amongst all other the children of my said brother Joseph: and upon trust to pay the interest of the sum of 1500*l.*, other part of the said sum of 5850*l.*, when and as the same shall be received, unto my said nephew, John Rhodes, and his assigns, for and during the term of his natural life, and as soon as conveniently may be after the death of the said John Rhodes, to call in the said sum of 1500*l.*, part of the said sum of 5850*l.*, and pay and divide the same unto and equally among all and every the children of the said John Rhodes; and upon trust to pay the sum of 1500*l.*, other part of the said sum of 5850*l.*, unto and equally amongst all and every the children of my sister Mary, who was in her lifetime the wife of David Blaymire; and upon trust to pay the sum of 400*l.*, other part of the said sum of 5850*l.*, unto my niece, Frances Blakeley, the wife of Reuben Blakeley, or her legal representatives: and whereas I am now responsible as surety for the said Reuben Blakeley unto Richard Greenwood, for the sum of 100*l.*, now it is my will and mind, and I do hereby order and direct my said trustees and executors to deduct and retain the said sum of 100*l.*, and all interest now due or hereafter to become due in respect of the same, unless it shall happen to be paid and satisfied by the said Reuben Blakeley, or some other person or persons on his behalf, out of the said sum of 400*l.* by me hereinbefore directed to be paid to the said Frances Blakeley as aforesaid; and upon trust to pay the sum of 400*l.*, other part of the said sum of 5850*l.*, unto my niece, Sarah Gill, the wife of John Gill, or her legal representatives; and upon trust to pay the sum of 400*l.*, other part of the said sum of 5850*l.*, unto my niece, Anne Hinchcliffe, the wife of Marmaduke Hinchcliffe, or her legal representatives; and in the event of my wife Mary not surviving me for the space of five years, but not otherwise, upon trust to pay the sum of 300*l.*, other part of the said sum of 5850*l.*, unto Miss Elizabeth Tinker, the sister of my said wife, or to her legal representatives: but if my said wife should happen to live beyond the time above-mentioned, then it is my will and mind that the said sum of 300*l.* shall sink into and become part of the residue of my said estate and effects, and be disposed of in manner hereinafter mentioned; and upon trust to pay the sum of 200*l.*, other part of the said sum of 5850*l.*, unto John Oldroyd, his executors, administrators, and assigns, if

he should live to attain the age of twenty-one years, but not otherwise; and upon trust to place the sum of 100*l.*, other part of the said sum of 5850*l.* out at interest on good security, and pay the interest, dividends and proceeds thereof, when and as the same shall be received, unto Richard Oldroyd, the brother of my late wife, and his assigns, for and during the term of his natural life, and, as soon as conveniently may be after his death to call in the said sum of 100*l.*, and pay the same unto and equally among all and every his children; and upon trust to pay the sum of 50*l.*, residue of the said sum of 5850*l.*, unto William Rhodes, son of my nephew John Rhodes, his executors, administrators and assigns, if he shall live to attain the age of twenty-one years, but not otherwise; also I give and bequeath unto James Crosland, my apprentice (if he continues in my service, or in that of my trustees or executors, until the expiration of his indentures of apprenticeship, by lapse of time, but not otherwise), the sum of 10*l.*, which I direct shall be paid to him out of my estate and effects. And it is my will and mind, that, in case any of the legatees or other persons entitled to any benefit or interest under or by virtue of this my will, shall happen to die before the money, or the benefit, or provision hereby given or made to or in his, her or their favour shall be raised and paid, and shall leave lawful issue, then it is my will and mind, and I do hereby direct my said trustees and executors to apply the interest of the money, which the parent so dying would have been entitled unto under this my will, for and towards the maintenance and education of such issue, until the younger of them shall attain the age of twenty-one years; and then I will and direct that the principal money, or the parent's share, shall be forthwith paid and divided unto and equally amongst such issue, if more than one, but if only one, wholly to that one. And it is my will and mind, and I do hereby direct my said trustees and executors to carry on the colliery which I now possess in Dewsbury aforesaid, and also the mill there, which is now in my own occupation, if an eligible tenant cannot be procured for the said mill, or if my said trustees think it most advisable to retain the said mill in their hands; and I hereby authorize them, and the survivors and survivor of them, and the heir of such survivor, to occupy and retain in their hands the lands now in my own possession, and by such ways and means as to them shall seem best, to raise and levy out of my estate, effects and property, whether real or personal, so much and such sums and sum of money as shall be requisite and expedient the better to enable them and him to carry on and continue the said colliery, mill and works; and from time to time to appoint a proper person or persons, with an adequate salary or salaries, to superintend such colliery and mill, and the works, affairs and business relative thereto; and I do hereby authorize and empower my said trustees and executors, and the survivors and survivor of them, and the heirs of such survivor, at any time or times, until all and every the trusts hereby in them reposed shall be carried into effect, by indenture or indentures, or other instrument in writing, under their respective hands and seals, whether referring or not referring to this present power, to grant, demise, or lease all or any part of the real estate by me hereby given and devised to them as aforesaid to any person or persons, for any term or number of years not exceeding seven years from the making thereof respectively, to take effect in possession, or within six months after the making thereof, and not in reversion or by way of future interests, so that upon every such lease there be reserved and made payable half-yearly during the continuance thereof,

and to be incident thereto, the best and most improved rent or rents that can reasonably be had and obtained for the same, without taking any fine, foregift or income in respect of the making thereof, and so that none of the lessees shall be made by any clause or words therein contained free from impeachment or exempted from punishment for committing waste, and so that in every such lease there be contained a clause in the nature of a condition of re-entry, in case the rent and rents thereupon to be reserved be behind and unpaid for the space of twenty-one days: provided always, and it is my will and mind, that in case any mortgage which now or at any time after my decease shall or may be charged upon all or any part of my said real estate shall be called in, and the moneys which shall have come to the hands of my said trustees and executors shall be inadequate and insufficient to pay and satisfy the same, then I do hereby order and direct and empower my said trustees and executors, or the survivors or survivor of them, or the heirs of such survivor, to raise and levy, borrow and take up at interest, by way of mortgage or charge upon my said real estate, or any part thereof, such sum or sums of money as shall be necessary to pay and satisfy such mortgage or mortgages and the interest due thereon, and all costs, charges and expenses incident to the calling in of, or borrowing money to satisfy, the same and every part thereof; and in order thereto, and for the purpose of perfecting such mortgage or mortgages, it shall and may be lawful to and for my said trustees and executors, and the survivors or survivor of them, and the heirs of such survivor, by any indenture or indentures to be by them or him sealed and delivered in the presence of and attested by two or more credible witnesses, to subject and charge my said real estate, which I hereby devise to them for that purpose, or a competent part thereof, to and with the payment of such sum and sums of money so to be borrowed as aforesaid, with interest for the same, so as the premises so to be subjected and charged as aforesaid be made redeemable on payment of the sum or sums of money so to be borrowed thereon, or on security thereof, and interest for the same: and I do hereby empower and authorize my said trustees and executors, and each and every of them, to retain out of my personal estate, or the rents and profits of my said real estate, all such costs, charges and expenses as they or any of them shall or may from time to time be put unto in or about the execution hereby in them reposed, or in anywise incident thereto, together with an adequate and reasonable compensation and satisfaction for their and each and every of their trouble in or about the same; and it is my will and mind, and I do hereby direct my said trustees and executors, by and out of the rents and profits of my said real estate, to educate my said nephew, John Wilson, so as to qualify him in their judgment for a tradesman and a man of business: and when and so soon as a sufficient sum of money shall be raised by all and every or any of the means aforesaid, to pay, satisfy, and discharge all my just debts, funeral expenses, the costs incident to the carrying of this my will into execution, the several sums of money by me hereinbefore given and disposed of, and the expenses of the education of my said nephew, John Wilson, then I give and devise all my messuage, dwelling-house, or tenements situate at or near Dewsbury Moor, in the township of Dewsbury aforesaid, and at or near Fall Lane, in the said township, and now or lately in the several and respective occupations of John Noble, Nelly Oldroyd, Thomas North, George Wilson, William Tolson, John Chatless, David Batley, widow Ellis and Thomas Hemingway, and also two messuages or dwelling-houses

which I am now erecting or have lately built at Dewsbury Moor aforesaid, adjoining or near to the said messuage in the occupation of Thomas North, unto my niece Hannah Blakeley, the daughter of my late brother William Wilson, and her assigns, during the term of her natural life; and after her decease, then I give and devise the same and every part thereof unto and equally among her lawful issue and their several and respective heirs and assigns for ever: also, I give and bequeath unto my said niece, Hannah Blakeley, her executors, administrators and assigns, the sum of 200*l.*, to be paid her by my nephews, John and William Wilson, in equal shares and proportions out of the estates and property by me hereinbefore given and devised to them respectively, within twelve months next after they shall respectively come to the possession thereof: also I give and devise all those my estates, situate in the township of Dewsbury, called Pilgrim's Cottage, and the lands adjoining, including the allotment of newly inclosed land, Squirrel Hall, and the lands thereto belonging or adjoining, including the allotment of newly inclosed land, Maple Close, Shepherd's Close, &c. and also all that my colliery in Dewsbury aforesaid; subject nevertheless to the payment thereout of the same 100*l.*, part of the sum of 200*l.* which I have hereinbefore given to my niece Harriet Blakeley aforesaid, and also to the payment, within twelve months next after my said nephew John Wilson shall come to the possession of the property by me last above given to him as aforesaid, of the sum of 300*l.*, which I hereby give and bequeath unto his sister Mary, to hold the said premises unto my said nephew John Wilson and his assigns during the term of his natural life; and from and immediately after his decease, then I give and devise the same unto his lawful issue, if more than one, equally, and their several and respective heirs and assigns for ever: but if my said nephew Joseph Wilson should happen to die without lawful issue, then I give and devise the said last-mentioned estate and premises unto William Wilson, son of my nephew William Wilson, his heirs and assigns for ever; subject nevertheless and charged with the payment of the further sum of 300*l.*, which I hereby give and bequeath unto Mary, sister of my said nephew John Wilson, to be paid to her within twelve months next after the said William Wilson, my great-nephew, shall become entitled to the property hereby given and devised to him; and I also give and devise unto my nephew William all that piece or parcel of land, situate at Dawgreen in Dewsbury aforesaid, which he purchased of me; and subject to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid, I give and devise unto my said nephew William all my messuages, buildings, lands and hereditaments situate at or near Dewsbury Moor aforesaid, and now or lately in the respective occupations of George Crawshaw, Benjamin Robinson and Joseph Higham, or their respective under-tenants; and also all that my close or parcel of land situate at or near Raven's Lodge, in Dewsbury aforesaid, and now in the occupation of John Honningway; and also all that my messuage and buildings situate at Dewsbury, and now or lately in the occupation of Joseph Carter, or his assigns, to hold the same unto my said nephew William Wilson, and his assigns, for and during the term of his natural life, subject nevertheless to the payment thereout of the sum of 100*l.* part of the said sum of 200*l.*, which I have hereinbefore given to my niece Hannah Blakeley; and from and after his decease, then I give and devise the same to his natural issue, if more than one, equally, and their several and respective heirs and assigns for ever; and as to all the rest, residue and remainder of my real estate, situate in Dewsbury aforesaid or elsewhere, I devise the same and every part thereof, subject

[Wilson *v.* Halliley.]

to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid, unto and equally between my said nephews John and William Wilson, and their several and respective heirs and assigns for ever, as tenants in common, and not as joint tenants."

The question in the cause was, whether the sum of 5850*l.*, in the will mentioned, was to be raised by sale or mortgage, or by annual rents and profits?

Mr Pemberton and Mr Kindersley, for the plaintiff, contended, that the money ought to be raised by sale or mortgage.

Mr Bickersteth and Mr Garratt, contrà.

The argument consisted of a commentary on the different clauses of the will; and in the course of it the following authorities were cited: Allan *v.* Backhouse, 2 Ves. & B. 65; Ivy *v.* Gilbert, 2 P. Wms, 13; Evelyn *v.* Evelyn, 2 P. Wms, 659; Codrington *v.* Foley, 6 Ves. 364.

June 14.—The Master of the Rolls. Whether the 5850*l.* is to be raised out of annual rents and profits, or by sale or mortgage, is a mere question of intention, to be collected from the context of the will, or from the purposes to which the money is to be applied. If those purposes require the immediate payment of the money, then it must be intended that the testator could not mean satisfaction by annual rents and profits, but by sale or mortgage.

The first direction here is, that the trustees are to convert the personal estate into money, and to sell the canal shares; and with and out of the moneys so to arise, and the rents, issues and profits of the real estates, to pay a legacy of 50*l.* and an annuity of 100*l.*, and the testator's funeral expenses and debts. Inasmuch as debts can be immediately claimed,—to the extent of this purpose, if necessary, a sale or mortgage might certainly be made. The testator proceeds to direct the trustees, in the next place, to raise and levy, by and out of the rents and profits of his real estate, the sum of 5850*l.*, and to place the same out at interest upon some eligible security; and he then apportions this sum between different legatees, giving life interests to many of them, with remainders over to their children; and if the subsequent part of the will did not afford a different construction, it might be inferred, from the circumstance of his giving life estates, that he meant the money immediately to be raised, because the delay attending the accumulation of the sum by rents and profits, might altogether defeat the intention of his bounty to the legatees for life. He proceeds, however, to direct, that, in case any of his legatees shall happen to die before the legacies given to them shall be raised and paid, and shall leave lawful issue, the issue shall enjoy the benefit intended for the parent. He is not to be understood here as speaking of a death of a legatee in his lifetime, but of a death at any subsequent period before the legacy is paid; and an inference arises that he considered some time must elapse before the legacies would be raised, which is hardly consistent with an intention that the 5850*l.* shall be immediately raised by sale or mortgage. He afterwards authorizes and empowers his trustees to grant leases of all or any part of his real estate; and, in case any mortgages, which he had made or might make of his real estate, should be called in, to levy, borrow and take up at interest, by way of mortgage, the sums necessary to pay and satisfy such mortgages, and all interest due thereon; and the observation here arising is, that he intended to preserve all his real estate, and that he

did not mean that his trustees should have power to sell any part of his real estate, even for the purposes of paying off mortgages; and that whenever he intended that they should have a power to mortgage, he expressed it in direct terms. He next authorizes his trustees to retain their costs, charges and expenses out of his personal estate, or the rents and profits of his real estate; and by and out of the rents and profits of his real estate to educate one of his nephews; and it is plain that, by the term "rents and profits," in the cases, he meant annual rents and profits. He then states, that, when a sufficient sum of money is raised by all and every or any of the ways and means aforesaid, which is by the application of his personal estate, and the rents and profits of his real estate, to discharge all his just debts, funeral expenses, and the several sums of money by him before given, he devises a certain real estate to his niece and her issue; and this points not to an immediate devise, but to a devise which is to take effect at a future or postponed period. He then gives to the same niece a sum of 200*l.* to be paid by his two nephews, John Wilson and William Wilson, within twelve months after they shall respectively come into possession of estates thereinafter given to them; and he gives another legacy of 200*l.* to be paid by John Wilson to his sister within the same period of twelve months. The time fixed for the payment of the legacies by the nephews plainly imports a postponed possession of the estates devised to them. Subsequent legacies are given on the same terms. He then devises to his nephew William a certain estate, "subject to the receipt of the rents and profits thereof by his trustees and executors for the purposes aforesaid:" and as to the rest, residue and remainder of his real estate, he devises the same, "subject to the receipt of the rents and profits thereof by his trustees and executors for the purposes aforesaid," to his nephews, John and William Wilson, and their heirs.

The two last devises, added to the observations before made, appear to me to leave no doubt that the purposes of the trust were to be satisfied out of the annual rents and profits, and not by sale or mortgage; and the declaration of the court must be accordingly.

Watson *v.* The Duke of Wellington.

Russell and Mylne, 602.

In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund.

June 14, 15, 1830.

THE plaintiffs were the executors of Mr Sims, who had advanced a large sum of money to the marquis of Hastings, on the joint bond of the marquis and a surety. The sum due on the bond exceeded 9000*l.*

Towards the end of 1825, the marquis having returned from India to England, the plaintiffs made repeated applications to him for the payment of the debt. The marquis represented that he was about to receive a large share of the Deccan prize-money; promised that their demand should be paid out of that fund; and begged that, in the mean time, no proceedings might be taken against him or the assets of his surety. On the 6th of

[Watson *v.* The Duke of Wellington.]

February 1826, Mr Allen, the solicitor of the plaintiffs, again waited on the marquis; who then stated that he had directed colonel Francis Doyle, whom he had empowered to receive his share of the prize-money, to pay the debt and costs due to the executors of Mr Sims; and at the same time his lordship wrote, and delivered to Mr Allen, the following letter, addressed to colonel Doyle:

"February 6, 1826.

"My dear Friend,

"As I shall leave you the distribution of the prize-money as soon as it shall be issued for me, I have to mention that the executors of Mr Sims are claimants on that fund for a bond debt with interest.

"Faithfully yours, HASTINGS."

"To Colonel Francis Hastings Doyle."

Mr Allen shortly afterwards showed the order to colonel Doyle, who then stated, that it would be necessary to send to him, through the solicitor of the marquis, the particulars of the demands of Sims's executors.

The bill insisted, that this letter, more especially when connected with the beforementioned promises and assurances by the marquis, amounted to an equitable assignment of so much of the prize-money as would be sufficient to satisfy the bond debt. It charged, and the evidence proved, that the marquis represented his share of the prize-money as an unincumbered fund; that he promised that the debt should be paid out of it; and that, on the faith of his representations and promises, the plaintiffs, at his request, abstained from taking legal measures against him and his surety.

The question was, whether the plaintiffs had any lien on the fund?

Sir Charles Wetherell and Mr J. Russell, for the plaintiffs.

The letter, taken by itself, is sufficient to create an equitable charge. It is addressed by the marquis to the person who is to have the disposition of the prize-money; and it states that the plaintiffs are claimants on the fund. How could they be claimants on the fund in respect of their bond debt, unless the debt were to be thrown on the fund? As general creditors of the marquis, they could have no claim on the fund. The words imply, if they do not expressly declare, that the debt is to be a claim on the fund; that is, that whatever shall be found due in respect of the bond debt shall be paid out of this particular fund. Can it be seriously believed, that this letter was by any party meant or understood to be nothing more than an intimation to colonel Doyle that the plaintiffs were creditors of the marquis; and that the colonel, when the prize-money came into his hands, was to advert to this circumstance, and was to pay their demand or not to pay it, according as his discretion or caprice might dictate?

But if any doubt can be raised as to the import of the letter, considered by itself, the doubt must vanish when we look at the circumstances which preceded and accompanied the delivery of this document. The marquis promised that this debt should be paid out of the prize-money: it was with reference to that promise, and with a view to give a security, that the letter was delivered to the solicitor of the plaintiffs; and on the faith of this promise, and resting on this security, the plaintiffs omitted to pursue their legal remedies. Writing is not necessary to create a trust of personal property. Bayley *v.* Boulcott, 4 Russ. 345. The circumstances of this transaction, even if the letter did not exist, would be sufficient to create a charge upon the fund, Stuart *v.* Kirkwall, 3 Madd. 387.

Mr Pemberton, Mr Kindersley and Mr Fane, for defendants, claiming to be mortgagees of the fund.

Mr Bickersteth and Mr G. Richards, for the administratrix of the marquis.

Even if the fund had been in the hands of colonel Doyle, a mere direction to him to apply a part of it in satisfying a particular debt, would not create a lien in favour of the creditor to whom that debt was owing. Ex parte Heywood, 2 Rose, 355; Williams *v.* Everett, 14 East, 582; Ex parte South, 3 Swanst. 392. Here the fund was not in the hands of colonel Doyle, and, in fact, he never received any part of it. There was nothing to hinder the marquis from directing that his prize-money should be paid to another person; and it is clear that the present plaintiffs could not have claimed a lien on it in any hands except those of colonel Doyle.

The Solicitor-General (sir E. B. Sugden), for the crown.

Mr Spence, Mr Wright and Mr Wray, for other defendants.

The Master of the Rolls. In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund. I am not at liberty to conjecture what might have been the intention of the parties, except as it is to be collected from the expressions of the letter; and, giving to the words of the letter their natural signification, I cannot there find any engagement on the part of the marquis of Hastings to pay the debt out of this money:—"As I shall leave to you the distribution of the prize-money, I have to mention that the executors of Mr Sims are claimants upon it." The natural import of the words is not a direction to colonel Doyle to pay the debt, but an intimation that the executors of Sims are claimants upon that fund, of which the marquis means to leave the distribution to the discretion of colonel Doyle. The bill must, therefore, be dismissed(*a*).

Dawson *v.* Hearn.

Russell and Mylne, 606.

Where a testator directs a government annuity of a certain amount to be purchased for his wife within a given time, and the wife, at the request of the executors, assents to postpone the time of purchase, and afterwards dies before it is purchased, her personal representative will be entitled to the sum which would have purchased the annuity.

Rolls.—June 16, 1830. L. C., July 25, August 8, 1831.

THOMAS HEARN, by his will, after giving among other legacies, 300*l.* to his wife, bequeathed as follows:—"I also direct, that from and out of my moneys and personal estate, an adequate sum be, within three calendar months next after my decease, laid out and invested in the purchase of a government annuity of 250*l.* per annum, in the name and for the use of my wife during her life; and I further will and direct that, in case my personal estate shall prove insufficient to purchase, and pay and

(*a*) Yeates *v.* Groves, 1 Ves. Jun. 280. Ex parte Scudamore, 3 Ves. 85. Ex parte Smith, 6 Ves. 446. Ex parte Alderson, 1 Madd. 53.

[Dawson *v.* Hearn.]

satisfy, the annuities and several pecuniary legacies hereinbefore by me directed and given, I charge and make subject my estate at Singleborough with and to the deficiency therein. All the rest and residue of my personal estate, not hereinbefore by me given and disposed of, I give to my brother, William Hearn, to be disposed of among his children and grandchildren, as he may think fit; and I nominate and appoint my brother William Hearn, and nephew Thomas Hearn, executors of this my will."

He died on the 28th of April 1827.

The wife, Susannah Hearn, died on the 28th of November 1827, before any annuity had been purchased, or any payments in respect of it made to her.

The bill was filed by the personal representative of the wife, claiming the sum which would have been necessary to purchase the annuity, if the direction in the testator's will had been followed.

The executors stated in their answer, that, at the death of the testator, the assets consisted principally of moneys out on securities, which could not be immediately gotten in: that, at the end of three months from the testator's death, they had not possessed assets sufficient to purchase the annuity; that the funds were then very high, and the health of Susannah Hearn very precarious: that the defendant, Thomas Hearn, who principally acted in the executorship, informed Susannah Hearn of his intention to postpone the purchase of the annuity; and told her, he doubted not that she would feel satisfied with the security of William Hearn, his father, and himself, as the executors of the testator, for the payment of the annuity in the mean time; to which she made no objection: that it was never considered by them, or either of them, that Susannah Hearn was, or could be, entitled to the principal sum required for the purchase of the annuity, or any part thereof; and that Susannah Hearn never made any demand of any principal sum in respect of such annuity.

Mr Bickersteth and Mr Swanston, for the plaintiff.

Where there is a bequest of an annuity, the legatee may take either the annuity, or a gross sum equal to the price of the annuity. Yates *v.* Compton, 2 P. Wms, 308; Barnes *v.* Rowley, 3 Ves. 305; Bayley *v.* Bishop, 9 Ves. 6; Palmer *v.* Craufurd, 3 Swans. 482, and the principle of these authorities was recognized in a late case of Brown *v.* Ross. The widow of this testator had a right to the value of this annuity; and, as the annuity was not purchased, her representatives are entitled to receive the sum by which that value is represented.

Mr Pemberton and Mr Turner, contrà.

In the cases cited, the bequest was, not simply of an annuity, but of a gross sum to be laid out in the purchase of an annuity. In this will there is no mention of any gross sum. The widow had a right merely to an annuity; and though she might have insisted on receiving a gross sum in lieu of it, she never availed herself of the power to make such an election. She never claimed any thing except as an annuity; and her personal representatives cannot alter the form and nature of her claim.

The Master of the Rolls. There is no difference in equity between the gift of a sum certain, to be invested in the purchase of an annuity, and the direction that, at a given time, a government annuity of a certain amount is to be purchased. The amount of both gifts is equally certain; and this court has considered it to be equivalent to a personal legacy of a

certain sum of money, because, when purchased, the annuitant may immediately sell the annuity. If the annuitant think fit, she may waive the purchase of the annuity, and may elect in lieu to receive the annual payment from the executor or residuary legatee; and this is the reason why, in a late case(*a*), where the annuitant for many years had received her annuity from the executor, I referred it to the Master, to inquire under what circumstances, and for what reason, the purchase of the annuity had been delayed.

In the present case, it is not pretended that the wife had waived her right to the purchase of the annuity, though, at the request of the executors, she had consented to postpone it. At the time of her death she retained the right to have the adequate sum invested; and her executor is now entitled to claim it as part of her personal estate.

By the decree it was referred to the Master to inquire what sum would have been required, at the expiration of three months from the decease of the testator, to purchase a government annuity of 250*l.* during the life of Susannah Hearn; and it was declared that the plaintiffs were entitled to that sum, together with interest thereon at the rate of four per cent from the end of three months.

The defendants appealed from his honour's decree.

July 25, 1831.—Sir Edward Sugden and Mr Swanston, in support of the decree.

The cases of Palmer *v.* Craufurd, 3 Swans. 482, and Bayley *v.* Bishop, 2 P. Wms, 308, decide the present question. The latter, indeed, goes a great deal further: for there a sum of money was to be laid out in an annuity for a son, after the death of his mother; and although the mother outlived the son, so that the time for making the investment never arrived, the money was directed to be raised and paid to his representative. If Mrs Hearn had survived her husband but a single hour, her executor, upon the principle of that case, would be entitled to the value of this annuity. In point of fact, however, the period limited for the investment expired before Mrs Hearn's death; and though she consented to a postponement of the purchase with a view to accommodate the defendants, they cannot be permitted to derive a contingent advantage from that circumstance, since it is not pretended that she ever abandoned her right. The only distinction suggested, that here the thing given is an annuity of a certain amount, and not a fixed sum for the purchase of an annuity, is merely nominal, and was exploded in Yates *v.* Compton, 2 P. Wms, 308. As soon as the prescribed period had elapsed, the bequest became as much ascertained, or, by a reference to the government tables, ascertainable, as if its amount had been specified in the will. If this had been an annuity bequeathed to a stranger for the life of the widow, and the latter had died after the three months, but before the investment was made, could it be seriously argued that the legatee should lose the value of his legacy? What difference can it make, that here the annuitant and the *cestui que vie* are one and the same person?

Mr Pepys and Mr Turner, for the executors.

The substance of the gift here is an annuity of a stated amount, and not,

(*a*) The Master of the Rolls referred here to Brown *v.* Ross.

as in the ordinary cases, an ascertained sum. The intention of the testator, as is shown by the bequest of 300*l.* till the annuity should be purchased, was to secure to his widow a competent provision for her declining years,—not to put into her hands a sum in gross, which she might squander and mismanage, or which might go eventually to her own relatives. There is nothing improper or illegal in that intention; and although the widow might perhaps have defeated it by signifying her election to the contrary, and demanding the value of the annuity in money, she has not attempted to do so. The *obiter dictum* of lord King in Yates *v.* Compton goes only to the extent of allowing the annuitant an option; the case itself decided nothing, for the report does not state in what right the money was decreed, and Jane Styles, whom the plaintiff represented, was the legatee both of the annuity and the residue. There is no law which declares that a testator may not restrict his bounty to a mere annual provision, or which releases his executors from the obligation to carry that purpose strictly into effect, provided he has expressed it in distinct and imperative terms. Doubtless the legatee of an annuity, who is *sui juris*, may sell it the day after it is bought; but the trouble and loss attending a sale, will in general deter him from such a step; especially if the annuitant be an elderly female, to whom a comfortable maintenance, well secured, is far more valuable than any price she could obtain. The cases referred to have all proceeded upon the principle of there being a gross sum given; which, being ascertained by the testator himself, the legatee is permitted to deal with at his pleasure. That distinction is expressly taken in Barnes *v.* Rowley, 3 Ves. 305. If the legatee of an annuity be a bad life, are the executors to have no discretion with regard to the time and mode of securing the annuity? May they not by arrangement with the legatee, and for the benefit of the estate, provide for its payment in a different way, or postpone the investment till a more advantageous opportunity; or must they at all events, and at whatever cost, at once set apart and invest the price?

August 8, 1831.—The Lord Chancellor (lord Brougham). Upon the authority of the cases which have been cited, particularly Yates *v.* Compton, 2 P. Wms, 308, I am of opinion that the absolute interest in this annuity vested, at the decease of the testator, in the widow. The widow had a right to have the annuity purchased, and her personal representatives have the same right. The executors ought to have bought it within three months; and they cannot say that she shall be placed in a worse situation, because they have not done their duty (for she did not die till after the three months had elapsed), than she would have been in, had they done what they ought to have done. It is said that, in Palmer *v.* Craufurd, 3 Swans. 482, and Bayley *v.* Bishop, 9 Ves. 6, there was a bequest of a specific sum, with a direction appended to lay it out in the purchase of an annuity. In the first place, Yates *v.* Compton, 2 P. Wms, 308 (which is the earliest case upon the point), is not open to that observation; for there the testator directed his executors to sell certain lands, and with the money arising from the sale, and the surplus of his personal estate, to purchase an annuity of 100*l.* for the life of Jane Styles; and the overplus also of the personal estate was to go to Jane Styles. That is a case, therefore, which is not liable to the observation by which it is sought to distinguish the present case from the others, because it is not a bequest of any specific sum; the sum to be paid for the annuity is not specified;

what is specified is the amount of the annuity which is to be bought. It is true there is a circumstance in that case which does not occur here: for there the residue was given to the same person who took the annuity, which might make some little difference in the argument. But that observation does not apply to Palmer *v.* Craufurd, or Bayley *v.* Bishop, or Barnes *v.* Rowley. In Palmer *v.* Craufurd, 3 Swans. 482, 3000*l.* was given to two trustees to purchase an annuity of 300*l.* for the life of G. Craufurd, in their own names, and to pay it to him half-yearly. The Master of the Rolls held, that the only question was concerning the effect of some correspondence, as evidence of his having elected to take a benefit under the will in another way, and not by way of annuity. In Barnes *v.* Rowley, 3 Ves. 305, the words were, "I bequeath to Mary Steele 250*l.*, which I have in the five per cents, to be laid out in an annuity for her life." Mary Steele, before the death of the testator, a few hours after the will, had attempted to commit suicide, and she effected that purpose two days after his decease. These were very strong circumstances to show the probable intention of the testator to give her a life interest by way of annuity only. A deranged person, seeking to destroy herself, was evidently not to be trusted; and one can hardly avoid importing that consideration into the case. Nevertheless, lord Loughborough made use of expressions which clearly excluded the operation of the argument, by which it is sought to found the doctrine of these cases upon the circumstance of there being a gift of the sum, and not a mere direction to lay it out in the purchase of an annuity. He asks, "Could I have prevented her from selling the annuity the next day," during the two days the unfortunate woman survived the testator? The answer must be, No. Then she, or her personal representatives, had a right to the same benefit, as if the annuity had been purchased during her life; and he adds, "The interference of the court against the will of the legatee, to compel the laying out the money in an annuity for a person, her own mistress, would have been perfectly nugatory and vain. The executor can never benefit by it. I cannot raise a doubt upon it."

All these cases, then, appear to have gone upon the principle, that it is not material whether a testator gives a sum of money, and directs it to be laid out in an annuity, or gives a general direction to his executors, to lay out so much money as will be sufficient to buy a given annuity. In Barnes *v.* Rowley the annuity was considered to have been vested from the death of the testator: and I can see no difference between giving a sum of money to be vested in an annuity, to be paid half-yearly to A. B., and ordering the executor to lay out so much money as shall be sufficient to buy for A. B. an annuity of a certain amount.

The judgment of the Master of the Rolls must be affirmed. Woodmeston *v.* Walker, post.

Bourn *v.* Gibbs.

Russell and Mylne, 614.

A testator gave to his wife the residue of his personal property, with a proviso, that if not disposed of by her in her life or by her will, it should go over. It passed, as part of her property, by her will, although not specifically noticed.

June 17, 1831.

THE residuary clause of the will of Richard Claringbould was in the following words: "Also I give and bequeath the sum of 200*l.* of like lawful money, and also the sum of 1000*l.* stock, residue of my capital stock, in the old joint stock of South Sea annuities, and also 200*l.* of capital stock in the three per cent consolidated bank annuities, and also all the rest and residue of my goods, chattels, effects, debts due and owing to me, money, securities for money in any of the public stocks or funds of the kingdom, and all other my personal estate whatsoever and wheresoever, and of what kind soever the same may be, at the time of my decease (from and after the payment of all my just debts, funeral expenses, the legacies before mentioned, and the legacy of 5*l.* hereinafter bequeathed to my executor John May, hereinafter mentioned, and the charges of proving and executing this my will), unto my wife Elizabeth Claringbould, to and for her own use and benefit, and to be at her own absolute disposal, and free from any control whatsoever; provided nevertheless that if my said wife shall make no disposition thereof, either by expenditure, sale, transfer, assignment, gift or otherwise in her lifetime, or by her last will and testament, then I direct that the said several sums of 200*l.* lawful money, and 1000*l.* in the old South Sea annuities, and 200*l.* stock in the three per cent consolidated bank annuities, and residuary personal estate, after such payments thereout as aforesaid, or such part thereof as shall remain undisposed of as aforesaid, shall, immediately after my wife's decease, go to, and I accordingly will and bequeath the same, unto my two nephews, Peter John Saunders and Thomas Saunders, and my said niece Ann Gibbs, equally to be divided between them, share and share alike, and to their several and respective executors, administrators and assigns."

The widow made her will, in which there was no reference or allusion to her husband's will; and she thereby disposed of all her personal estate to other persons than those who were named in her husband's ultimate residuary bequest. A sum of stock, which was part of the testator's property given to the wife, remained in his name at the widow's death; and the question in the cause was, whether this passed by her will?

Mr Bickersteth and Mr Barber, for the plaintiffs.

The residuary estate of Richard Claringbould became his wife's absolute property; and it passed by her will as part of her assets. Bull *v.* Kingston, 1 Mer. 314; Attorney-General *v.* Hall, Fitzgibb. 314, 2 Eq. Ab. 293, cited with approbation in Wynne *v.* Hawkins, 1 Bro. C. C. 179; Bland *v.* Bland, 2 Cox, 349(*a*).

(*a*) See also, on this point, Lightburne *v.* Gill, 3 Bro. P. C. 250, Toml. ed.; Upwell *v.* Halsey, 1 P. Wms, 651, and the cases referred to in the notes.

Mr Pemberton and Mr Farrer, contrà.

The wife had undoubtedly a power of disposing of the stock in question, either by applying it to her own use, or by making an appointment; but if she did not dispose of it, the testator gave it to his nephews. He did not mean that it should be part of her general assets; her interest was to cease with her life, unless she spent the fund or made an express disposition of it; and if the will, which she has made, does not contain any reference to her authority, or to this specific fund, it cannot be deemed an execution of her power.

The MASTER of the ROLLS was of opinion that the widow took an absolute interest in the whole of the testator's residuary estate, and that the stock in question did pass by her will.

Kinsman *v.* Kinsman.

Russell and Mylne, 617.

In a creditor's suit, the debts and costs were paid by the sale of one of two devised estates, and the court directed the Master to settle the proportion which was to be borne by the other devised estate: the devisee of the first mentioned devised estate was entitled for life only; and, he being an ignorant person and a day labourer, no proceedings were had under this direction for twenty-six years, at the end of which time the other devised estate was sold. The year following the tenant for life died, and his son, who was entitled in remainder, filed a bill to charge the purchaser of the other devised estate with the proportion which it ought to have contributed towards the debts and costs; and a decree was made by the Master of the Rolls accordingly, upon the ground of *lis pendens*, which was held to amount to equitable notice of the charge.

On appeal the decree was reversed by the Lord Chancellor, on the ground that there was no *lis pendens* at the time of the purchase.

Rolls.—June 17, 1830. L. C., August 2, 3, 4, 23, 1831.

THE testator, who died in 1780, by his will devised an estate, called Sandy Park, to William Kinsman for his life, with remainder in tail to his son, the present plaintiff, then an infant; and another estate called the manor of Northwood, to the defendant, Simon Kinsman, for life, remainder in tail to his son, who was another defendant. After the death of the testator, a creditor's bill was filed for establishing the will and administering the estate; and by the decree made on the 23d of May 1792, after directing the usual accounts of the personal estate, it was ordered, that, if the personal estate were insufficient for the payment of the debts, the two estates of Sandy Park and Northwood should contribute thereto in proportion to their respective values. On the 19th of February 1798, the cause came on for further directions upon the Master's report, which ascertained a considerable deficiency of the personal estate for payment of the debts, and the two estates were ordered to be sold. In pursuance of that order the Sandy Park estate was sold for 3400*l.*; but, Simon Kinsman having placed the title-deeds of the Northwood property in an iron pot, and buried them in his garden, no title could be made to that estate, and it remained unsold. On the 13th of March 1798, the cause came on again for further directions, when the debts and the costs of the suit up to

that hearing were ordered to be paid out of the 3400*l.*, and it was referred to the Master to settle the proportion of the debts and costs which ought to be borne by the Northwood estate. The whole of the sum of 3400*l.* was exhausted in the payment of debts and costs, except the sum of 390*l.*; and the Master reported that the sum of 873*l.* 1*s.* 8*d.* was the proportion of the debts and costs which ought to be borne by the Northwood estate. An order was also made for laying out the sum of 390*l.* in three per cent consols, and for the payment of the dividends to W. Kinsman during his life.

William Kinsman was a poor and ignorant man, who gained his livelihood as a day labourer; and no further proceedings were had in the cause until after his death, which happened in February 1825, when the solicitor employed by the present plaintiff, upon an application to the court for the payment to the plaintiff of the sum of 390*l.*, became apprized of the facts of the case; and, about the same time, he discovered that Simon Kinsman and his son had, in the year 1824, joined in a sale of the Northwood estate to a Mr Fortescue for the sum of 2700*l.*, who afterwards conveyed it to his son, one of the defendants.

The present was a supplemental suit for the purpose of having the sum of 873*l.* 1*s.* 8*d.* with interest and costs raised out of the Northwood estate.

Mr Pemberton and Mr Daniell, for the plaintiff.

Mr Tinney and Mr Parker, for the defendants, Simon Kinsman and his son.

Mr Bickersteth and Mr Kindersley, for Mr Fortescue.

The defendant Fortescue put in a plea of purchase for valuable consideration without notice, to which the plaintiff replied: no evidence was entered into in support of the plea.

Several questions were raised in the course of the argument, but the point principally discussed, and upon which alone the judgment turned, both at the Rolls and the court above, was, whether there had here been a *lis pendens* of such a nature as to affect the purchaser with equitable notice. Upon that point the following authorities were referred to: Worsley *v.* Earl of Scarborough, 3 Atk. 392; Gore *v.* Stacpole, 1 Dow, 30; Style *v.* Martin, 1 Ch. Ca. 150; Sugden's Vendors and Purchasers(*a*).

The Master of the Rolls decreed that the sum of 870*l.* 1*s.* 8*d.*, with interests and costs should be raised; stating, that at the time of the sale to Mr Fortescue, there was plainly a *lis pendens*, which amounted to equitable notice of the charge, and that, but for the sale, which made a supplemental bill necessary, he would now have ordered the charge to be raised out of the Northwood estate, upon an application in the original suit.

Aug. 2, 3, 4, 1831.—The defendant, Fortescue, appealed from that decree.

Mr Pepys and Mr Daniell, for the plaintiff.

The Solicitor-General (sir W. Horne), sir E. Sugden and Mr Kindersley, for the appellant.

In support of the decree it was argued, that, as Mr Fortescue had bought

(*a*) 735—8, 7th ed., where all the cases are considered.

the Northwood estate during the pendency of a suit, in which it had been declared chargeable with the sum now sought to be recovered, he must be considered in equity, as having had constructive notice. There was no pretence for saying that at the time of his purchase the cause was at an end. The report of the Master ascertaining the amount of the charge had been regularly confirmed, but no final decree, directing the money to be raised, had ever been pronounced. The surplus produce of the other estate, which had been administered in the same suit, remained in the custody of the court, and, under orders made in the cause, the dividends were payable to the tenant for life, till his death in 1825, a period subsequent to the date of the purchase. Indeed, the Master of the Rolls had intimated that, but for the transfer of interest occasioned by the sale, he should have felt no difficulty in ordering the charge to be raised upon a petition in the original suit, without the expense of a supplemental bill. The existence of a *lis pendens* was therefore unquestionable; and it was scarcely conceivable how the purchaser or his advisers, if they had used reasonable diligence in investigating the title, could have failed to discover the fact.

On the other side it was contended, that, if this were to be considered as constituting *litis pendentia*, half the lands in the kingdom would be placed *extra commercium;* since, in a large proportion of suits instituted for the administration of assets, and under which charges might eventually be established against real estate, no final decree was ever made; but as soon as their immediate object was attained, the *actors* declined to prosecute them farther. In the present instance, after the creditors, who proved their debts, had obtained a decree for payment, they had no motive in proceeding; and the suit was of course suffered to go to sleep. In common understanding, and for all practical purposes, a cause was absolutely determined, when the object had been accomplished for which it was originally commenced. It was nothing to the plaintiff or to the public, what equities the court might afterwards see fit to administer between the different defendants. In strictness there could be no *litis pendentia* between co-defendants. The order made in 1792, or at all events that in 1798, was, therefore, really the final decree; but if it were otherwise, the circumstances which had occurred since, the laches of the parties, the undisputed transfer of the property, and still more, the leaving the defendant Simon Kinsman in the undisturbed possession of the Northwood estate, thereby enabling him to commit a fraud upon the purchaser, were tantamount to an abandonment of the suit. And yet, according to the plaintiff's argument, no length of time, not fifty years, or a century, would be sufficient to destroy the *litis pendentia*, unless a decree were pronounced, formally dismissing the cause out of court, a decree which, in practice, never was made, and which it was nobody's interest to ask. Such a doctrine was absurd in principle, and would be most mischievous in its operation. Lord Bacon, in his twelfth rule (Beames's Orders, p. 7), laid it down, that *lis pendens* cannot affect a purchaser, unless it be closely and vigorously prosecuted.

In addition to the authorities cited in the court below, Bishop of Winchester *v.* Paine, 11 Ves. 194(*a*), was referred to.

Aug. 25—The Lord Chancellor, after stating the circumstances of the case, observed, that the single question was, not whether *lis pendens*

(*a*) Sorrell *v.* Carpenter, 2 P. Wms, 482, and the cases cited in the note.

was notice to a purchaser, for of that there could be no doubt; but whether there was or was not a *lis pendens* in this case? He took it to be perfectly clear that, in order to constitute *litis pendentia*, there must be a continuance of *litis contestatio;* and without going so far as to say with lord Bacon, that there must be a constant and vigorous prosecution of the suit, still something should be done to keep it alive and in activity. It was unnecessary to go through the authorities which had been adverted to, the rather, as, with the exception of Worsley *v.* Earl Scarborough, where lord Harwicke drew the acknowledged distinction between a pending suit and a decree, they would not be found to lay down any distinct principle upon the subject. He was ready to admit that a decree for an account in a creditor's suit would not determine a *lis pendens*. But when the proceedings went a great deal further than the account; when the cause had been referred to the Master, to see what proportions of a given incumbrance two estates should respectively bear; when the Master had made his report; when that report, unobjected to and unexcepted to, had been finally confirmed; when the whole of the equities between the parties had been adjusted and adjudicated upon; when every thing had been obtained under the decree which the suit had contemplated, and nothing remained but to carry the decree into effect, the case was most materially changed. After the decree, and before execution, it was not pretended that *lis pendens* could any longer exist. If that were in substance the case here, to what did the difference in form amount? It might be true, that no general decree had been made upon the cause coming back for further directions. And why was it so? In all probability because no farther directions were required; the rights of the parties having been ascertained and decided by the report, that report confirmed, and still unappealed from, was in truth the final judgment in the cause. How many years have elapsed after that decree had been pronounced? Upwards of a quarter of a century; and matters might have gone on for a century longer, because nobody had any motive to interfere. If the supplemental bill were considered as growing out of the former suit, that might, in a certain sense, be held to be, and perhaps his honour had so held it, a continuance and prosecution of the original cause; but it would be an abuse of the plain meaning of the term *lis pendens* to apply it to a case like the present, where the supplemental bill was not filed till after the sale had taken place.

Upon these grounds, his lordship was of opinion that, at the time when the purchase was made, there was no *litis pendentia* of which the purchaser was bound to take notice, and that the judgment of the court below ought, therefore, to be reversed.

The other defendants, Simon Kinsman and his son, were served with the petition of appeal, but did not appear.

Fosbrooke *v.* Balguy.

Russell and Mylne, 624.

THE eighth of the new orders applies only to the case of exceptions, and if the plaintiff afterwards move to amend his bill, the defendant is entitled to an order for time to answer, according to the old practice.

June 21, 1830.

Propert *v.* Parker.

Russell and Mylne, 625.

If the defendant himself writes the agreement for the purchase of a leasehold house, and states his own name in the third person as "Mr A. B. has agreed;" this is a good contract within the statute of frauds, though he does not otherwise sign the agreement.

June 21, 1830.

THIS was a bill for the specific performance of a contract for the purchase of a leasehold house. The contract was written by the defendant, but was not signed by him. It stated the agreement in the third person, in the following form: "Mr Wilmot Parker has agreed," &c.

Mr Bickersteth and Mr Girdlestone, for the plaintiff.

Mr Tinney and Mr Girdlestone, junior, for the defendant.

For the defendant it was objected that the insertion of his name, in his own handwriting, in the beginning of the agreement, was not a signing within the meaning of the statute of frauds; and in support of the objection Morison *v.* Turnour, 18 Ves. 175(*a*), was cited.

The MASTER of the ROLLS overruled the objection; observing that what the statute of frauds requires, is, that the party who is sought to be charged, shall, by writing his own name, have attested that he has entered into the contract.

The usual order of reference as to title was made.

(*a*) See Sugden's Law of Vendors and Purchasers, 87—90, 6th edit., and the cases there cited.

Attorney-General *v.* Christ's Hospital.

Russell and Mylne, 626.

Where an annuity is given to a charitable institution for ever upon a condition, and is once accepted and acted upon, it cannot afterwards be renounced at pleasure; although the gift is coupled with a direction, that, upon the neglect or refusal of the institution at any time to act upon the condition, the annuity shall be applied in another manner.

June 29, 1830.

MR GUY, who was the founder of Guy's Hospital, in his will, after mentioning a charter of incorporation which he intended that charity should obtain, made a bequest in the following words: "Item, I give to the president and governors of Christ's Hospital in London, and their successors for ever, one annuity or yearly sum of 400*l.* to be paid by my said executors till such intended corporation shall be obtained and take effect, and then, by such intended corporation, or their treasurer for the time being; provided, nevertheless, and upon this condition, that my said executors, and such intended corporation and their successors, shall have liberty from time to time to nominate and put into Christ's Hospital aforesaid, yearly and every year for ever at Easter, or within six months after, such four poor children, boys or girls, whether orphans or otherwise, or the children of freemen of the city of London, or unfreemen, not less than seven, or more than ten years of age, as my said executors, or the said intended corporation and their successors shall think fit, with preference to my relations, as often as any such shall offer themselves; who shall be received into the said hospital, and have the maintenance and education thereof, and be continued therein in like manner as other children are maintained and educated in the said hospital; and my will is, that, in case and as often as the said president and governors of Christ's Church Hospital shall neglect or refuse to take in and maintain the said number of boys and girls to them nominated, and qualified as aforesaid, it shall be lawful to my said executors, and the said intended corporation, and they are hereby directed and desired to apply the said annual sum of 400*l.* to the education and maintenance of such four poor children as aforesaid, in such other school or place, and in such other manner as they shall think fit."

The governors of Christ's Hospital accepted the legacy, and, from the year 1725 to the present time, complied with the annexed condition; but they now decline to do so any longer, contending that, by the true construction of the latter part of the bequest, they were not bound by the acceptance of the legacy to continue to act under it, but were at liberty to abandon the gift, together with the condition annexed to it, whenever they thought fit.

Mr Pemberton and Mr Wigram, for the relators.

The sum of 400*l.* a year is given to the governors of Christ's Hospital and their successors for ever; but it is given upon condition, that the governors of Guy's Hospital and their successors should have liberty, yearly and every year for ever, to put into Christ's Hospital four children, to be

educated and maintained in the same manner as the other objects of that charity. The legacy could not be accepted in part and rejected in part: it could not be accepted for one hundred years and no longer: being accepted, it was accepted absolutely; and the governors of Christ's Hospital are therefore bound for ever by the condition. The direction for applying the annuity to the education and maintenance of an equal number of poor children in some other place, in case the governors of Christ's Hospital should neglect or refuse to admit them, does not give a right so to refuse or neglect.

Mr Bickersteth and Mr Phillimore, contrà.

This is a bequest of a yearly payment, subject to a condition which is to be performed yearly; and the testator, contemplating that, at some future time, the parties might deem the condition too burdensome, and decline to comply with it, has, in that event, directed the yearly sum to be differently applied. It is not consistent with the language of the will to say, that the testator considered that the governors of Christ's Hospital, if they once accepted any of the yearly payments, were never to be at liberty at any future time to neglect or refuse to admit four boys yearly. The sum of 400*l.* a year is not at present sufficient to maintain four boys or girls yearly for the whole length of time during which each child, when once admitted, is entitled to remain on the foundation; and the extra expense must be provided for out of the other property of the charity. It is not likely that the testator should have intended, instead of benefiting Christ's Hospital, to create an incumbrance on its funds; and such a purpose cannot reasonably be imputed to him.

The Master of the Rolls. If the annuity were given to Christ's Hospital for such time only as they should continue to act upon the condition, then, indeed, they would be at liberty to retire from it at their pleasure. But here the annuity is given to them and their successors for ever; and, having once accepted it, they are for ever bound by the condition(*a*). The latter part of the clause, which authorizes the executors or the intended corporation to apply the 400*l.* a year in another manner, if the governors of Christ's Hospital shall refuse or neglect to act under the condition, is not to be considered as authorizing that refusal or neglect, but as a collateral remedy to secure, at all events, the testator's charitable intention.

(*a*) Attorney-General *v.* Christ's Hospital, 3 Bro. C. C. 165; Attorney-General *v.* Andrews, 3 Ves. 633.

Garratt *v.* Niblock.

Russell and Mylne, 629.

A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken wife.

Rolls.—June 22, 1830.

THE will of S. Richards, which bore date the 12th of September 1821, and was not duly attested to pass real estate, after desiring that his wife should leave off shopkeeping, gave several pecuniary legacies, and proceeded in these words:—"I then give to my beloved wife all my household furniture, and to her own disposal; likewise I give to my beloved wife all my freehold property in the parish of Risely; all my money in the funds, mortgages, bonds, notes of hand, &c. for her own use during her natural life." After her decease the testator directed his freehold property, and his property in the funds to be sold, and the produce to be divided among seven of his relations and their families, in manner therein mentioned; and he appointed J. W. Niblock (to whom he gave a legacy of 100*l.*) and his wife, his executor and executrix.

The wife was not mentioned by name in any part of the will. At the time of its execution, the testator was a married man; and, upon the death of his wife some time afterwards, he, in April 1824, married a second wife, who survived him. He died in the month of August 1824. Probate was granted to J. W. Niblock alone, as surviving executor.

One question in the cause was, whether the testator's widow was entitled to a life-interest in the funded and other personal property under the bequest to his "beloved wife?"

Mr Beames and Mr Stinton, for the plaintiffs, the residuary legatees.

Mr Bickersteth and Mr Garratt, for the executor.

Mr Tinney, Mr K. Parker and Mr Keene, for the next of kin who were not legatees.

Mr Pemberton, for the widow.

On the one hand it was contended, that the description of "beloved wife" was applicable only to the wife *in esse* at the date of the will, and was as much personal to her as if her christian name had been inserted in the instrument. Waring *v.* Ward, 5 Ves. 670(*a*).

On the other side it was argued, that the words were general, and would apply indifferently to any individual who should fill the character of the testator's wife at the time when his will was to take effect. In this view the term "wife" was descriptive of a class, like children or eldest son,—expressions which had been held to extend to all children, or to any son who answered the description at the testator's death(*b*). An opposite

(*a*) Foster *v.* Cook, 3 Bro. C. C. 347; Powell on Devises, by Jarman, I. 307, n., 339, 340, and n. So, a bequest to the parish where one lives, and testator afterwards changes his parish, is a good bequest to the first. Com. Dig. Chancery, 3 (Y) 16, pl. 1.

(*b*) West *v.* Primate of Ireland, 2 Cox, 258.

construction would leave the widow entirely unprovided for, unless, which upon the will was extremely doubtful, and which he certainly never intended, the testator had left a part of his property undisposed of.

The MASTER of the ROLLS was of opinion that the widow was not entitled to a life interest in the testator's personal estate; and he decreed accordingly.

Badham *v.* Mee.

Russell and Mylne, 631.

A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A., and next to apply the rents to the maintenance, education and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.: Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father.

Rolls.—June 28, 1830.

PATIENCE MEE, by her will, devised the Tiled House estate to trustees, upon trust that they should receive the rents, issues and profits thereof, as the same should from time to time become due, and in the first place, according to their will and pleasure, and not otherwise, allow and pay, yearly or oftener, to or for the use or benefit of her son Richard Mee the elder, any sum or sums of money, not exceeding in the whole in any one year the sum of 50*l*., but so as her son during his life should have no other estate, right or interest in the messuage, farm and lands, than her trustees, or the survivors or survivor of them and his heirs, should, in their or his free and uncontrolled power and discretion, think fit and proper; and in the next place, should pay, apply and dispose of the rents, issues, and profits of the messuage, farm and lands, unto and for the maintenance, education and bringing up of Richard Mee, Sarah Mee and John Mee, the children of her son Richard Mee, during the life of her son. The residue of her real and personal estate she gave to her two daughters.

Richard Mee the elder was still living; Richard Mee the son and Sarah Mee were dead; John Mee had long since attained the age of twenty-one; and one question in the cause was, whether John Mee had any interest in the rents of the Tiled House estate after he attained twenty-one.

Mr Treslove and Mr Rolfe, for the residuary devisees of Patience Mee.

The devise being only for the maintenance, education and bringing up of three of the children of Richard Mee the elder, must be intended to be confined to their minority. Amb. 663. To educate and bring them up was the object of the bequest, and maintenance is referred to merely as incidental to the other principal purposes. Whenever there ceased to be any one of them who was under age, the direction to the trustees to apply the rents towards their education and bringing up could no longer be carried into effect; and from that time the rents and profits were undisposed of, except by the residuary gift. Hamley *v.* Gilbert, Jacob, 354.

Mr Bickersteth and Mr Wright, contrà, cited Alexander *v.* Maccullock, 1 Cox, 391.

The MASTER of the ROLLS observed that, though the terms "maintenance, education and bringing up," where no period was fixed except what was implied in the import of the words themselves, would have reference to minority, yet here the testatrix had limited a different period, namely, the life of the father; and he therefore held, that John Mee, as the survivor of the three children, was entitled to the surplus rents and profits during the life of his father.

Halliwell *v.* Tanner.

Russell and Mylne, 633.

Where a testator gives to three different persons three leasehold estates, one of which is mortgaged, and directs that the mortgage shall be paid out of his residuary personal estate, which proves insufficient for that purpose, the legatee of the mortgaged leasehold takes it *cum onere*, and the legatees of the two other leaseholds shall not contribute towards the payment of the mortgage debt.

July 5, 12, 1830.

THE testator, having three leasehold estates, bequeathed them to three different persons; and, one of them being subject to a mortgage made by him, he directed the mortgage-money to be paid out of his residuary personal estate. The personal estate being insufficient for that purpose, a question was made, whether the legatees of the two other leasehold estates should contribute rateably with the leasehold estate in mortgage towards payment of the mortgage debt.

Mr Bickersteth and Mr Barber, for the legatees of the unincumbered leaseholds, cited Oneal *v.* Mead, 1 P. Wms, 693; Rider *v.* Wager, 2 P. Wms, 328; Lutkins *v.* Leigh, Cas. temp. Talb. 53; Forrester *v.* Lord Leigh, Amb. 171, and Aldrich *v.* Cooper, 8 Ves. 382.

Mr Purvis and Mr Jacob, contrà, relied on the intention of the testator to exonerate the mortgaged leasehold, as indicated by the direction in the will. In the cases referred to on the other side, contribution was refused, because no such intention appeared. Carter *v.* Barnardiston, 1 P. Wms, 509; Headley *v.* Readhead, Coop. 50, and Trimmer *v.* Bayne, 7 Ves. 508.

The MASTER of the ROLLS. In the case of Oneal *v.* Mead, 1 P. Wms, 693, it was decided that, as between a devisee of a mortgaged fee-simple and a specific legatee of personalty, the devisee shall not have his mortgage paid by the specific legatee, but shall take the mortgaged fee-simple *cum onere*. *A fortiori*, a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold. The direction, that the mortgage debt should be paid out of the residuary personal estate, merely follows the general rule of law; and, that fund failing, the legatee of the mortgaged leasehold must take it *cum onere*.

Watts *v.* Turner.

Russell and Mylne, 634.

WHERE a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it had been approved by his solicitor, unless he were paid a sum of money, the court ordered the conveyance, with costs against the defendant.

Rolls.—July 6, 1830.

Rowlands *v.* Tucker.

Russell and Mylne, 635.

A SIMPLE contract creditor, who files a bill for the administration of assets, will not be allowed his costs, if the estate is not sufficient for the payment of specialty debts.

Rolls.—July 8, 1830.

Livesey *v.* Harding.

Russell and Mylne, 636.

Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over, unless there were a failure of issue of all the devisees, there the devisees take cross remainders.

Where estates tail are given to two persons only as tenants in common, there cross remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally or respectively.

Rolls.—July 8, 16, 19, 1830.

THE testator, upon the failure of issue of his eldest or only son, limited his estate in the words following:—"To the use of all and every the daughter and daughters of me the said Edmund Livesey, and the heirs of their bodies, to take as tenants in common; if more than one, equally; and if but one, to the use of such only daughter of me the said Edmund Livesey, and the heirs of her body for ever; and for default of such issue, to the use of my own right heirs for ever."

One question in the cause was, whether the daughters took cross remainders in tail?

Mr Agar, Mr Preston and Mr Duckworth contended, that cross remainders were to be implied between the daughters. If there were only two daughters (as was the case here), and the devise had been to them by

name, cross remainders would have been implied. The construction must be the same, the devise being to them as a class; and the implication would not be prevented by the circumstance that more than two individuals might be comprised in that class; for the rule, which excludes the implication of cross remainders between more than two, does not apply where the limitations are to a class, and not to certain persons by name or individual description. Besides, it was evident that the testator did not mean that any part of the estate should go over to his right heirs, so long as there was any issue of his daughters; and that intention could not be effected, unless cross remainders were implied.

Mr Treslove and Mr Teed, contrà, argued that a devise to daughters and the heirs of their bodies, to take as tenants in common, was equivalent to a devise to them and the heirs of their respective bodies; a mode of limitation which, it was said, excluded the implication of cross remainders, even as between two devisees.

The following cases were cited: Comber *v.* Hill, 2 Strange, 969, Cas. temp. Hardwicke, 22; Phipard *v.* Mansfield, Cowper, 797; Atherton *v.* Pye, 4 T. R. 710; Watson *v.* Foxon, 2 East, 36; Doe d. Gorges *v.* Webb, 1 Taunt. 234, and Green *v.* Stephens, 17 Ves. 64.

The Master of the Rolls. It being manifest that the testator intended that no part of the estate should go over, unless there were a failure of issue of all his daughters, it necessarily follows that the daughters took cross remainders.

Where there is a gift to two persons only and the heirs of their bodies, cross remainders will be implied, although there is no expressed intention that no part of the estate shall go over until the failure of issue of both, unless the limitation to them be successively, severally or respectively, and then the remainders over will be several and respective.

Collins *v.* Shirley.

Russell and Mylne, 638.

ASSIGNEES of an insolvent mortgagor are not entitled to the costs of a suit for foreclosure, though they by their answer disclaim, and say that if they had been applied to, they would have released the equity of redemption.

An insolvent mortgagor, even where his assignees disclaim all interest in the equity of redemption, ought not to be made a party to a suit for foreclosing the mortgage.

Rolls.—July 9, 1830.

Humphreys *v.* Howes.

Russell and Mylne, 639.

A testator gave the residue of his estate to trustees, upon trust, to pay the dividends to A. during her life; and after her death, to transfer the trust-moneys to his two nephews B. and C., share and share alike; and if either of his nephews died before his share of the trust-moneys became payable, without leaving issue, the share of him so dying was to go to the survivor; B., one of the nephews, died in the testator's lifetime, and left no issue: Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C.

July 9, 12, 1830.

JOHN HUMPHREYS bequeathed the residue of his personal estate to Johnson Howes, and Hoffgaard Shoobridge, upon trust to invest the same in government securities; "and upon trust," continued the testator, "that they, Johnson Howes and Hoffgaard Shoobridge, or the survivor of them, or the executors or administrators of such survivor, do and shall pay the dividends, interest and produce of the said trust-moneys, as the same shall become due and payable, unto my brothers Samuel Humphreys and Peter Humphreys, and my sister Hannah Coker, equally, share and share alike, during the term of their natural lives, and to the survivor of them during his or her natural life; and from and after the decease of them, my brothers and sisters, Samuel Humphreys, Peter Humphreys, and Hannah Coker, then upon trust that they the said Johnson Howes and Hoffgaard Shoobridge, or the survivor of them, or the executors or administrators of such survivor, do and shall pay, assign, transfer and dispose of the said trust-moneys, and the dividends and interest and produce thereof, unto my nephew John Crow, son of my said sister Hannah Coker, and my nephew John Humphreys, son of my brother Peter Humphreys, equally, share and share alike; and in case either of my nephews John Crow and John Humphreys shall happen to die before his share of the trust-moneys last mentioned shall become payable by virtue of this my will, without leaving issue of his body lawfully begotten, then my mind and will is, that the share of him so dying, of and in the said trust-moneys, shall go and be paid to the survivor of my two nephews John Crow and John Humphreys, when his original share therein shall become payable; and in case both my nephews John Crow and John Humphreys shall happen to die before their share of the trust-moneys shall become payable, without leaving issue of their bodies lawfully begotten, then upon trust that they the said Johnson Howes and Hoffgaard Shoobridge, or the survivor of them, or the executors or administrators of such survivor, do and shall pay, assign, transfer and dispose of the trust-moneys last mentioned, and the dividends, interest and produce thereof, unto and amongst all and every the child and children of my brothers Samuel Humphreys, Peter Humphreys, William Humphreys and Isaac Humphreys, and my sister Hannah Coker, as shall be then living, equally, share and share alike, when and as they shall attain their respective ages of twenty-one years."

The testator's two brothers, Samuel Humphreys and Peter Humphreys, died in his lifetime: the nephew John Crow also died in his lifetime, and without leaving issue.

[Humphreys *v.* Howes.]

The next of kin of the testator insisted that, by the death of John Crow in the testator's lifetime, the moiety of the residue bequeathed to him lapsed: and the bill was filed by the nephew, John Humphreys, for the purpose of asserting his claim to the whole of the residue.

Mr Tinney and Mr Lloyd, for the plaintiff.

The will contains an express direction, that, in case either of the nephews dies without leaving issue, before the bequest becomes payable to him, his share of the trust-moneys shall go to the survivor; and it is immaterial whether he dies in the lifetime of the testator or after his death, but before the interests of the tenants for life have expired. Willing *v.* Baine, 3 P. Wms, 113; Humberstone *v.* Stanton, 1 V. & B. 385, and Walker *v.* Main, 1 Jac. & W. 1.

Mr Pemberton and Mr Bethell, contrá.

Cripps *v.* Wolcott, 4 Mad. 11, proves that survivorship is referred to the death of the testator, if no interest be given prior to that of the legatees among whom the survivorship is to take place; but if a previous life estate be given, it is referred to the death of the tenant for life. According to the principle of that doctrine, where the event of the death of a legatee is provided for, that death ought to be considered to mean dying in the testator's lifetime, if the interest of the legatee is not preceded by a life interest given to another, and dying in the lifetime of the tenant for life, if a previous life estate be given. Accordingly, in Bone *v.* Cooke, 13 Price, 332, M'Clel. 168, a direction, which was to take effect in case of the death of a legatee in remainder before the legacy became payable to him, was held to apply only to the event of his surviving the testator, and dying in the lifetime of the tenant for life. In this class of cases the question is, whether the testator contemplated the death of the legatee in his lifetime, or the event of his surviving him and dying afterwards. If a previous life estate be not given, there is no other period to which the death of the legatee can be referred, except the life of the testator; but where there is a previous life estate, it is death during the continuance of that tenancy for life which is contemplated. What this testator has given over to the survivor of his nephews is "the share of him so dying of and in the trust-moneys." It must have become *his* share, that is, the interest must have vested in him, before it can go over in the event of his death: if he die in the testator's lifetime, he never has an interest in the moneys; there is no share of them which can be called *his;* and, consequently, there is no share of them which can pass by the limitation over. Rider *v.* Wager, 2 P. Wms, 331; Corbyn *v.* French, 4 Ves. 418.

The confusion and error, which seem to pervade some of the authorities on this subject, have been occasioned by an inaccuracy in Vernon's report of Miller *v.* Warren, 2 Vern. 207. In that case a testator gave to Nicholas Miller 1500*l.*, to be paid him at twenty-one; to Benjamin Miller 1500*l.* when he attained the like age; and to Elizabeth Miller and Mary Miller 1500*l.* a-piece, to be paid at eighteen or marriage; and in case one or more of the aforesaid children should happen to die before his, her or their legacy or legacies should become due, then his, her or their legacy or legacies were to be equally divided amongst the survivors of them. Mary, one of the four children of Miller, died in the lifetime of the testator; and, according to Vernon's report, the question was, whether her 1500*l.* should go to the surviving children. He says it was decreed that it should survive; and he adds, "if a legacy is devised to A. at twenty-one, and if he

die before, to B., though A. die in the lifetime of the testator, the legacy shall go to B." In Willing *v.* Baine, 3 P. Wms, 113, Miller *v.* Warren is cited and relied on; and Willing *v.* Baine, in its turn, became, in Humberstone *v.* Stanton, 1 Ves. & B. 385, the occasion of drawing from sir William Grant an observation which was not at all necessary for the decision of the question before him. Thus the supposed doctrine on the point has all proceeded upon what was believed to have been decided in Miller *v.* Warren. But it now appears by the extract from the decree contained in Mr Raithby's note on that case, that the decision was directly the contrary to what Vernon states it to have been; for the bill was dismissed, in so far as it claimed by survivorship a share of Mary Miller's legacy.

Mr Pattisson, for the trustees.

Mr Tinney, in reply.

July 12.—The Master of the Rolls. The leading case on this subject is Willing *v.* Baine, 3 P. Wms, 113. There a testator bequeathed 2000*l.* a-piece to his children, payable at their respective ages of twenty-one years; and if any of them died before their age of twenty-one, the legacy so given was to go to the surviving children. One of the children died in the lifetime of the testator, and before twenty-one: and it was held that the legacy given to him went to the surviving children. That authority is referred to by sir William Grant in Humberstone *v.* Stanton, 1 Ves. & B. 385; and he says, "it is now settled, that in such a case the bequest over takes place."

In the argument of the present case it was stated, that in Willing *v.* Baine, there was no previous interest for life, and that the previous interest for life, which is limited here, makes the difference; and two or three authorities were referred to in support of that distinction: but it will be found upon examination that in none of these did the decision proceed upon a principle which has any application to the present question. Thus, in Bone *v.* Cooke, 13 Price, 332, M'Clel. 168, a testator gave a legacy to one for life, with remainder to another person; and he declared that, if the remainder-man should die before the bequest became payable, it should go to his executors or administrators, as part of his personal estate: the remainder-man having died in the lifetime of the testator, the question was, whether his executors could claim the bequest; and the court held that the legacy was lapsed, and that the death, upon which it was to go to the executors or administrators of the legatee in remainder, was a death during the life of the tenant for life.

The very point raised here was decided in Walker *v.* Main, 1 Jac. & W. 1. There a previous interest was given to the widow for life; remainder to the testator's children; and if any of them died before his legacy became payable, it was to go to the survivors: two of the children died in the testator's lifetime: and it was there held, as a settled point, that the death of a child during the life of the testator did not cause the legacy of the child to lapse.

Davis *v.* Davis.

Russell and Mylne, 645.

A direction in a will, that the testator's brother should be his executor to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favour of the daughter.

Rolls.—July 16, 1830. L. C., Nov. 16, 26, 1831.

THE testator in this cause made his will in the following words :—"It is my will that my brother, Samuel Davis, be my executor, to arrange, dispose of, and settle all my affairs, and I appoint him guardian to my daughter, Anna Maria."

The daughter, Anna Maria, was the testator's only child ; and, during his life, no doubt as to her legitimacy had been entertained by him or any other person : but after his death, it was discovered that she was illegitimate, in consequence of the formalities required by the law, as it then stood, not having been duly observed on the marriage of the testator and her mother. Samuel Davis, the brother, was one of the testator's next of kin.

The question in the cause came ultimately to be, whether by the will a gift of the testator's personal estate to his daughter was to be implied.

Mr Tinney, in support of the implication, cited Atkinson *v.* Paice, 1 Bro. C. C. 91 ; Peat *v.* Powell, 1 Eden, 479, Amb. 387 ; Doe dem. Wight *v.* Cundall, 9 East, 400, and Tomkins *v.* Tomkins, referred to in that case.

Mr Bickersteth and Mr Lynch, contrà.

There may probably be enough in this will to show that the testator did not mean his brother to take his property beneficially, and that the executor was to be a trustee for the next of kin. But that will not assist the plaintiff's case ; and there is no circumstance from which an inference specifically in her favour can be deduced, unless it be that the testator has appointed his brother her guardian. This appointment is ineffectual ; and how an unavailing attempt to appoint a guardian to a natural child can operate as a gift to that child of the whole of the testator's personalty cannot easily be conceived.

The Master of the Rolls. It is plain that it was not the intention of the testator that his brother should take a beneficial interest, but that he should only arrange and settle his affairs : and, from his appointment as guardian to the daughter, it is to be implied that the arrangement and settlement was to be for her benefit. The daughter is, therefore, to be considered as the legatee of the personal estate. A different construction would certainly disappoint the testator's intention.

Nov. 16, 1831.—The executor appealed from his honour's decree.

Sir E. Sugden and Mr Lynch, for the appellant, contended that his

honour's decision carried the doctrine of bequest by implication to a dangerous extent, and infinitely farther than the cases warranted. The first clause, nominating the testator's brother to be his executor, to manage, dispose of, and settle his affairs, did not affect to deal with the property at all, but merely designated the individual by whom the property was to be administered for the benefit of the persons to whom the law might give it. Could, then, the subsequent clause, either standing alone, or coupled with the former, amount to a bequest? That clause appointed the brother to be the guardian of the daughter, Anna Maria (an appointment which, as she was illegitimate, her father had no power to make), but it said not a word of any property to which she was to be entitled. In the full belief that Anna Maria was his lawful child, and, as such, his next of kin, the testator considered it superfluous to bequeath to her in terms that which he felt assured the law itself would bestow. The circumstance of her supposed legitimacy, which at once explained the reason why, with all his anxiety for his daughter's welfare, he should have made no express provision for her by his will, furnished the most cogent argument against the implication attempted to be set up in her favour.

Mr Tinney and Mr Barber, on the other hand, submitted that, upon the plain meaning of the words, the brother could be nothing but a trustee: he was nominated an executor solely for the purpose of managing, disposing of and settling the testator's affairs; and the single question was, for whom was he to be that trustee? The very next sentence in the will, taken in connexion with the context, supplied the answer. He was to be a trustee for the only other individual named in the instrument, for the daughter, Anna Maria, of whom it appointed him the guardian. He stood *in loco parentis* to his infant niece; and to him, therefore, as her guardian, was intrusted the care and protection of her person, as well as the management of her fortune, till she came of age, when, of course, he was to make it over to her. Morally speaking, it was impossible to doubt the testator's intention that his daughter should then come to the enjoyment of his property; and, rather than disappoint that intention, and allow him to die intestate, the court would eagerly lay hold of an implication which the relative situation of the parties, and the peculiar provisions of the will naturally, if not necessarily, raised.

In addition to the cases referred to in the court below, Newland *v.* Shephard, 2 P. Wms, 194; Hammond *v.* Neame, 1 Swanst. 35; Bird *v.* Hunsdon, 2 Swanst. 342; Crowder *v.* Clowes, 2 Ves. Jun. 449; Goodright *v.* Hoskins, 9 East, 306, were cited.

Nov. 26.—The Lord Chancellor (lord Brougham), in delivering judgment, observed, that the will contained no words of positive gift; and there was nothing, so far as he could perceive, in its language or provisions, from which a bequest to the daughter could be safely or reasonably implied. The authorities relied upon in support of such an implication, and particularly Newland *v.* Shephard and Goodright *v.* Hoskins, even granting them all the weight that was claimed for them at the bar (although the former had been at different times a good deal questioned, and the latter had been mainly rested by lord Ellenborough upon special grounds), fell very far short, in his opinion, of the case now standing for decision. For these reasons he felt himself under the necessity of coming to a different conclusion from his honour, and the decree must therefore be reversed.

Torres *v.* Franco.

Russell and Mylne, 649.

By a marriage settlement, stock was vested in trustees, upon trust, to pay the dividends to the husband during coverture, and to the wife during her life, in case she survived him; and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the said children as should attain twenty-one or be married, with a direction, in case all or any of such children should then be under twenty-one and unmarried, to apply the dividends for their maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the said children, in case there should be any, and all of them should die under age and unmarried, in trust for certain other persons: the wife survived the husband, and at her death there was no child of the marriage living; but a son, who died in her lifetime, had attained twenty-one, and married: Held, that the stock vested in that son absolutely.

July 17, 1830.

BY articles of agreement, executed in contemplation of an intended marriage between Jacob Namias Torres and Rebecca Britanias, a sum of 1500*l.* bank stock was vested in trustees upon trust, "as to the dividends and interest of the sum of 1500*l.* bank stock, which shall accrue due during the joint lives of Jacob Namias Torres and Rebecca Britanias, to pay the same to him, Jacob Namias Torres, or to authorize and permit the same dividends and interest to be received by him for his own use; and from and immediately after the time of the death of Jacob Namias Torres, in case Rebecca shall survive him, then upon trust from and immediately after such his death, as to the dividends and interest of the sum of 1500*l.* bank stock, from thence and during the life of Rebecca Britanias to accrue due, to pay the same dividends and interest to her the said Rebecca, or to authorize and permit the same to be received by her for her own use; and from and immediately after the time of the death of the said Rebecca Britanias, in case there shall be any child or children of the said intended marriage living at the time of her decease, then upon trust to stand possessed of the said sum of 1500*l.* bank stock for the use and benefit of such of the said children as shall attain the age of twenty-one years, or be married, equally to be divided between or amongst them, share and share alike, if more than one, and if there shall be but one such child who shall live to attain that age, or be married, then for the sole use and benefit of such child; and in case all or any of such children shall, at the time of the death of the said Rebecca, be under the said age of twenty-one years, and unmarried, then, as to the dividends and interest of the said sum of 1500*l.* bank stock, or of the apparent share or shares thereof of the said child or children, who shall for the time being be under the said age, and unmarried, to accrue due until he, she or they shall attain that age, or be married, upon trust to pay the same unto the said Jacob Namias Torres, in case he shall be then living, he maintaining and educating such child or children; but in case the said Jacob Namias Torres

shall die before all such children shall attain the said age, or be married, then upon trust to pay, apply and dispose of the last-mentioned dividends and interest in, for, or towards the respective maintenance and education of such child or children so under age and unmarried; and in case the said Rebecca Britanias shall die without leaving any child or children at the time of her decease, or in case there shall be one or more such children or child then living, yet all of them shall die under the age of twenty-one years, and unmarried, then and in such case, and if the said Jacob Namias Torres shall survive the said Rebecca Britanias and all such children, if any there be, then as to the dividends of the said sum of 1500*l.* bank stock to accrue due from and after the time of the death of the longest liver of the said Rebecca Britanias and all the said children, and during the lifetime of the said Jacob Namias Torres, upon trust to pay the same dividends and interest to him, or to authorize and permit the same to be received by him for his own use; and from and immediately after the time of the death of the survivor of them, the said Jacob Namias Torres and Rebecca Britanias, and also from and after the death of all the said children, (in case there shall be any, and all of them shall die under age and unmarried as aforesaid), then the said sum of 1500*l.* bank stock shall be paid to David Franco, Abraham Haim Franco, Jacob Franco the younger, and Daniel Franco, and their respective executors, administrators and assigns, in the shares and proportions therein mentioned.

The marriage was solemnized. Rebecca Britanias survived her husband; and at her death no child of the marriage was living; but a son, who died in her lifetime, had attained twenty-one, married, and left children. No other child of the marriage had attained twenty-one or married.

The question in the cause was, whether this son took a vested interest in the 1500*l.* stock?

Mr Pemberton and Mr Theobald, for the personal representatives of the deceased son.

In construing wills, and still more in construing marriage settlements, the court inclines against making the right of children to a provision dependent on the contingency of their surviving both or either of their parents. In Powis *v.* Burdett, 9 Ves. 428, portions were provided for younger children whom the parent should leave at his death, to be paid at twenty-one; and a child, who attained twenty-one, and died in the lifetime of the parent, was held to be entitled. In Woodcock *v.* The Duke of Dorset, 3 Bro. C. C. 569, the words were, "That, if lord John and lady Frances should leave at the death of the survivor any child or children of their two bodies, then the sum of 5000*l.* was to be raised and paid to such child or children upon their attaining the age of twenty-one years:" and it was held, that a child, who, having attained twenty-one, died in the lifetime of lady Frances, took a vested interest. The same principal of construction was followed in Perfect *v.* Lord Curzon, 5 Mad. 442; Maitland *v.* Chalie, 6 Mad. 243; and Howgrave *v.* Cartier, 3 Ves. & B. 79. In the last case sir William Grant lays down the rule, "If the settlement is incorrectly or ambiguously expressed; if it contain conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision; usually as to sons, at the age of twenty-one, and as to daughters, at that age

or marriage." Now, though there are phrases in some parts of this settlement which import that only such children as shall be living at the death of the mother are to take, there are other clauses in which reference is made to the event of all the children dying under twenty-one and unmarried, as being the only state of circumstances on which their interests are to fail. There is obviously great inaccuracy in the phraseology of the instrument; for, in providing for the event of the mother's surviving the father, the dividends are directed to be paid, after the mother's death, to the father, for the maintenance of the children.

Mr Tinney and Mr J. Russell, contrà.

By the first part of this settlement the dividends of the stock are given to the husband during the joint lives of him and the wife; remainder to the wife during her life, in case she should survive him: and the subsequent limitations are not confined to the event of the wife surviving the husband, but dispose of the fund after her decease, whether she survive her husband or the husband survive her. It is a mistake, therefore, to say that there is any inaccuracy in the phraseology of the deed, because in some of these subsequent limitations reference is made to the possibility of the husband being alive, when they take effect. The disposition of the property, after the wife's decease, is expressed in unequivocal words. The trust is, in case there shall be any children of the marriage living at her decease, for such of the said children as shall attain the age of twenty-one years or be married; and a provision is made for the event of all or any of such children (that is, children living at the decease of the mother), being then under the age of twenty-one and unmarried. These are the only words of direct gift to the children; and the gift is confined in the most express terms to children living at the death of the mother. The settlement next proceeds to direct, that, in case Rebecca Britanias shall die without leaving any child or children, or in case there shall be one or more such child or children then living, and yet all of them (that is, all of the children living at her death) shall die under twenty-one and unmarried, the husband is to receive the dividends during his life, "and from and immediately after the death of the survivor of them, Jacob Namias Torres and Rebecca Britanias, and after the death of all the said children," (that is, children living at the death of the mother,—for these are the only children mentioned in the settlement,) "in case there shall be any, and all of them shall die under age and unmarried as aforesaid," the fund is limited over to certain persons named. Throughout all the clauses, "such children," and "the said children," are children of the marriage living at the decease of the mother: and the fund is given over, in the event either of there being no children living at the mother's decease, or if there be such children then living, of their dying under twenty-one and unmarried. This settlement clearly and unequivocally makes the right of a child to a provision dependent on the contingency of its surviving the mother; there is no ambiguity or inaccuracy of expression which can authorize the court to deviate from the express words of the instrument; and, therefore, nothing vested in the son who attained twenty-one, married, and died in the mother's lifetime. Hotchkin *v.* Humfrey, 2 Mad. 65; Fitzgerald *v.* Field, 1 Russ. 430.

The Master of the Rolls. This case is to be decided upon the principle established in Howgrave *v.* Cartier, 3 Ves. & B. 79. The gift over is not to take effect, unless all the children die under age and unmarried.

This is inconsistent with the clause which imports, that a child, to take, must survive the mother; and where clauses are conflicting, the rational presumption is, that a child, attaining twenty-one, takes a vested interest. Clutterbuck *v.* Edwards, post.

Sherratt *v.* Bentley.

Russell and Mylne, 655.

A PERSON named a trustee without his knowledge, and in that character a party to the suit, having never accepted the trusts, is entitled to his costs as between solicitor and client.

July 22, 1830.

Parker *v.* Fuller.

Russell and Mylne, 656.

Persons having prior incumbrances on freeholds and copyholds, of which a trader, who died intestate, was seised at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estates.

July 23, 1830.

A FATHER devised to his son freehold and copyhold estates charged with annuities and legacies; the son died intestate, and was, at the time of his death, a trader within the meaning of the bankrupt laws. The bill was filed by a creditor of the son, for the purpose of having the freeholds and copyholds, devised to him by his father, applied in payment of his debts. The annuitants and legatees under the will of the father were defendants; and the question was, whether they were properly made parties to the suit.

Mr K. Parker, for the plaintiff, contended, that a decree could not be made for the sale of the estates, unless the annuitants and legatees were before the court; that, as copyholds were not within the 47 Geo. 3. sess. 2, c. 74, they could not be made directly available to the payment of the son's debts; but to whatever extent the legatees and annuitants might have exhausted the freeholds, the creditors would be entitled to come in upon the copyholds; and that this process of marshalling could not be carried into effect unless the persons, between whom it was to take place, were before the court.

Mr T. Parker, contrà.

The Master of the Rolls held, that the legatees and annuitants, being merely persons having incumbrances on the estates prior to the interest of the son, ought not to have been made parties.

Ansley *v.* Bainbridge.

Russell and Mylne, 657.

The assumption by a father of a debt due from his son to a partnership, in which the father and the son, along with other persons, were partners, was deemed an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death.

July 24, 1830.

BY settlement made on the marriage of John Bainbridge, a sum of 4000*l.*, secured by his bond, was so limited, as, upon his death, to become payable to a son, who was the only issue of the marriage. The father admitted the son into partnership with himself and two other persons. The son overdrew his account with the partnership to the amount of upwards of 19,000*l.*; and an arrangement was entered into between all the partners, by which the son ceased to have any interest in the concern, and the father took upon himself the son's debt.

After the father's death, the trustees of the bond filed the present bill to have the 4000*l.* satisfied out of his assets; and the question was, whether the assumption of the son's debt by the father was to be deemed an advancement, so as to amount to satisfaction of the bond.

Mr Pemberton and Mr Ching, for the plaintiffs, cited Goldsmid *v.* Goldsmid, 1 Swanst. 219; Devese *v.* Pontet, 1 Cox, 189; Onslow *v.* Michell, 18 Ves. 490. There were no circumstances, they said, to show that what the father had done was meant to be a substitution for that which his covenant bound him to do. The assumption of the son's debt was a part of a specific arrangement, in which the existence of the bond was in no way adverted to: it was a measure to which the father was led by anxiety for the prosperity of the concern in which he himself had a great share, and by a wish to allay the fears of the partners, who were alarmed at the state of the son's account.

Mr Bickersteth and Mr R. Roupell, for the executrix of the father, contended, that the father's assumption of the debt of the son was tantamount to payment of it to the partnership; that the circumstance of the father being one of the partners made no difference; and that the case was precisely the same as if the father had advanced the 19,000*l.* for the payment of the son's debt to another person.

The Master of the Rolls dismissed the bill, upon the ground that the assumption of the debt of 19,000*l.* by the father for the son was to be deemed an advancement of the 4000*l.*

Rayley *v.* Best.

Russell and Mylne, 659.

To a bill for a commission to ascertain boundaries, all persons having any interest in the property, are necessary parties.

July 27, 1830.

THE plaintiff was tenant for life of an undivided moiety of certain premises. The bill alleged that the person, in whom the other moiety was vested, had taken a lease of the plaintiff's moiety, and being thus in possession of the whole, had confounded the boundaries of this property and of an adjoining tenement, of which he was the owner. The prayer was for a partition, and for a commission to ascertain the boundaries.

The remainder-men, to whom the inheritance of the plaintiff's moiety was limited, were not parties to the suit; and on this ground the defendants objected to the frame of the bill.

Mr Tinney and Mr Walker, in support of the objection.

It may be doubted, notwithstanding the decision in Baring *v.* Nash, 1 Ves. & B. 551, whether the court ought to proceed to so important an act as partition, where all the persons interested in the property are not parties to the suit. But this bill prays that the boundaries of the premises may be ascertained; and such a bill cannot be maintained, unless all the persons interested in the inheritance are before the court. In Miller *v.* Warmington, 1 Jac. & W. 484, the Attorney-General was made a defendant, merely because there was a suggestion that the crown had an interest in the reversion expectant on a term, of which upwards of three hundred years were unexpired. Speer *v.* Crawter, 2 Mer. 410.

Mr Bickersteth, Mr Pemberton and Mr Wilbraham, contrà, cited Baring *v.* Nash, 1 Ves. & B. 551, and Wills *v.* Slade, 6 Ves. 498; and they argued, from analogy to the rule of cases of partition, that the remainderman or reversioner was not a necessary party to a bill for a commission to ascertain boundaries.

The Master of the Rolls held, that the court would not entertain a bill for a commission to ascertain boundaries, without having before it all the parties interested; and he, therefore, allowed the objection.

Holmes *v.* Holmes.

Russell and Mylne, 660.

A TESTATOR, by his will made in Ireland, prior to the 6 Geo. 4. c. 79, bequeaths an annuity, and dies domiciled in England, after that act was passed. The annuity is to be paid according to the rate of Irish currency.

Rolls.—July 27, 1830.

Sutton *v.* Sutton.

Russell and Mylne, 663.

Under the treaty of 1794 between Great Britain and America, and the act of the 37 Geo. 3. c. 97, American citizens, who held lands in Great Britain on the 28th of October 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens, but as native subjects of Great Britain.

July 29, 1830.

THIS was a bill for the specific performance of a contract; and the Master having reported against the title, an exception was taken to his report, which now came on to be argued.

The title of the vendor was derived under a conveyance from a citizen of America; and the question was, whether, under the circumstances of this case, and in relation to the property, which was the subject of the contract, an American citizen was to be deemed an alien?

Samuel Strudwick, before and at the time of the separation of the United States of North America from Great Britain, was settled in North Carolina, and he continued to reside there, as an American citizen, till his death in 1794. By his will, dated in that year, he devised to "his good friend Margery, widow of Stephen ———, lately living at Fulham in England, his houses and lands in the city of London, in trust to be sold, when Mr Vaughan's annuity shall drop in, and the moneys arising from such sale to be employed as therein mentioned:" and, after bequeathing two small annuities, he gave the residue of his real and personal estate to his son William Francis Strudwick. A part of this testator's property consisted of an undivided share of certain tenements in the city of London, which were the subject of the present suit. A person of the name of Margery Bourget was considered to be the devisee referred to in the will: she declined to carry the trust into effect, or to interfere in the management of the property, and was said to have died about the year 1806. William Francis Strudwick, the heir at law and devisee of Samuel, was an American citizen, and died intestate in the year 1810, leaving Samuel Strudwick, also an American citizen, his eldest son and heir at law. In 1819, the last mentioned Samuel Strudwick sold and conveyed his undivided share of the tenements in the city of London; and upon this conveyance the title of the vendor depended.

One of the objections taken to the title was in the following words:— "that Samuel Strudwick, the vendor, in 1819, of two eighth parts of the estate, was an alien, and incapable of conveying them, such shares having been the property of Samuel Strudwick, his grandfather, who was settled in America at the time of the separation of the two countries in 1783, and who was alleged to have devised them to his son William Francis Strudwick, who was an American, and died there in 1810 intestate, leaving the said Samuel Strudwick, the grandson, his heir at law; and that no proof had been shown that, after the separation, Samuel Strudwick, the grandfather, or William Francis Strudwick, was a subject of the king of Great Britain."

The question turned upon the construction of the treaty of peace between

Great Britain and the United States, signed at London on the 19th of November 1794, and of the 37 Geo. 3. c. 97, which was passed for the purpose of carrying the treaty into execution.

By the first article of that treaty it was agreed, "that there should be a firm, inviolable, and universal peace between Great Britain and the United States."

The second article, after some regulations relative to the withdrawal of the British troops, declared, "that the settlers and traders within the precincts of the posts from which the British troops were to be withdrawn, should continue to enjoy their property of every kind, and be at liberty to remain there, or to remove their effects, and to sell or retain their lands and property at their discretion; that such of them as should continue to reside within the boundary line, should not be compelled to become citizens of the United States, or to take any oath of allegiance to the government thereof, but should be at full liberty so to do, if they thought proper, and should declare their election within one year after the evacuation aforesaid; and that all persons who should continue there after the expiration of the year, without having declared their intention of remaining subjects of his British majesty, should be considered as having elected to become citizens of the states."

The third, fourth and fifth articles related to the boundaries of the new states, the navigation of the rivers, &c.; and the sixth, seventh and eighth, to the adjustment of the pecuniary claims of individuals.

The ninth article enabled the subjects of either country to hold lands in the other, and to sell and devise them as if they were natives. The terms of it, relative to Americans holding lands in England, were, "that American citizens, who then held lands in the dominions of his majesty, should continue to hold them according to the nature and tenure of their respective estates and titles therein, and might grant, sell or devise the same to those whom they should please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens."

And by the tenth article it was stipulated, "that neither debts due from individuals of the one nation to the individuals of the other, nor shares nor moneys which they might have in the public funds or private banks, shall, even in any event of war or national differences, be sequestrated or confiscated; it being unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other, and in their respective governments, shall ever be destroyed or impaired by national authority, on account of national differences and discontents."

The subsequent articles of the treaty, down to the twenty-eighth, contained various stipulations relative to navigation, and the mutual delivery up to justice of persons charged with murder or forgery. The twenty-eighth article declared, "that the first ten articles of the treaty should be permanent, and that the subsequent articles, except the twelfth," (which related to the intercourse with the West Indies, and was to continue in force for two years after the then war), "should be limited in their duration to twelve years, to be computed from the day on which the ratifications of the treaty should be exchanged, subject to the renewal of the negotiations at a period therein mentioned; but if his majesty and the United States should not be able to agree on a new arrangement, in that case all the articles of the treaty, except the first ten, should then cease and expire together."

[Sutton v. Sutton.]

In 1797 the 37 Geo. 3. c. 97, was passed, which is intituled "An act for carrying into execution the treaty of amity, commerce and navigation, concluded between his majesty and the United States of America." It contained the following clauses:

"Sect. 24. And whereas by the ninth article of the said treaty, it was agreed that British subjects, who then held lands in the territories of the said United States, and American citizens, who then held lands in the dominions of his majesty, should continue to hold them according to the nature and tenure of their respective states and titles therein, and might grant, sell or devise the same to whom they should please, in like manner as if they were natives; and that neither they nor their heirs or assigns should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens; be it therefore enacted, by the authority aforesaid, that all lands, tenements and hereditaments in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which, on the said 28th of October 1795 (being the day of the exchange of the ratification of the said treaty between his majesty and the said United States), were held by American citizens, shall be held and enjoyed, granted, sold and devised, according to the stipulations and agreements contained in the said article; any law, custom or usage to the contrary notwithstanding.

"Sect. 25. Provided always, that nothing herein contained shall extend, or be construed to extend, to give any right, title or privilege to any person, not being a natural born subject of this realm, which such person would not have been entitled to if this act had not been made, other than and except such rights, titles and privileges as shall be necessary for the true and faithful performance of the stipulations in the said article contained, according to the true intent and meaning thereof, or to give to any person, not being either a natural born subject of this realm, or a citizen of the said United States, any right, title or privilege, to which such person would not have been entitled if this act had not been made.

"Sect. 27. That this act shall continue in force so long as the said treaty between his majesty and the United States of America shall continue in force, and no longer."

This act was continued by the 45 Geo. 3. c. 35, which, after reciting that the 37 Geo. 3. c. 97, "was to continue in force so long as the said treaty should continue in force, and no longer: which treaty, or so much of it as relates to the matters contained in the said act, has now ceased and determined: and it is expedient that the liberty of navigation and commerce between the people of this kingdom and the people of the United States of America, should continue for a limited time, in the same manner and under the same limitations and conditions as are specified in the said act,"—enacted that "the said act, and every thing therein contained, shall, notwithstanding the said treaty has ceased and determined, be deemed and taken to be and to have been in full force and effect, and shall so continue in force until the 1st of June 1806."

The 37 Geo. 3. c. 97, was subsequently continued from time to time by the 46 Geo. 3. c. 16, and 47 Geo. 3. sess. 2, c. 2, and, finally, by the 48 Geo. 3. c. 6, to the end of the then present session of parliament. That session terminated in the same year; and no act was afterwards passed to revive or prolong the operation of the treaty.

The point argued was, whether the twenty-fourth section of the 37 Geo. 3. c. 97, taken in connexion with the ninth article of the treaty,

continued in operation, so as to remove the incapacity of holding and transmitting lands in England, which would otherwise have attached on William Francis Strudwick and Samuel Strudwick, the grandchildren, as aliens.

Mr Bickersteth, Mr Pemberton, Mr Tyrrell, Mr Wright and Mr Wood, in support of the objection to the title.

The treaty of 1783 dissolved the tie of allegiance which had previously subsisted between the crown of England and the individuals who then became American citizens; they and their descendants, born out of the British dominions, were thenceforth aliens; and accordingly Doe *v.* Acklam, 2 B. & C. 779, has established, that a person, born in the United States since 1783, cannot inherit lands in England. Doe d. Auchmuty *v.* Mulcaster, 5 B. & C. 771. William Francis Strudwick, and Samuel Strudwick, the grandson, were clearly aliens. The only distinction between the present case and that of Doe *v.* Acklam is, that the freehold of the tenement in question was not in an English subject on the 28th of October 1795, but in an American citizen. Now it is true, that, as to such lands, the incapacity of alienage was removed by the 37 Geo. 3. c. 97; and so long as that statute was in operation, American citizens might hold, grant, sell or devise these lands in the same manner as if they were natives. But by the twenty-seventh section the act is to continue in force only so long as the treaty shall be in force, and no longer; and the single question, therefore, is, whether the treaty was or was not in force in 1819. On this point we have a legislative declaration in 1805. The 45 Geo. 3. c. 35, says in the preamble, "which treaty or so much of it as relates to the matters contained in the said act (*i. e.* the 37 Geo. 3. c. 97,) has now ceased and determined;" and, among the matters contained in the said act, was the stipulation for excluding the incapacity arising from alienage; and the same statute declares in the enacting clause, that "the said treaty has ceased and determined." By that statute, and two subsequent acts, the 37 Geo. 3. was revived both retrospectively and prospectively; but it finally expired with the session of 1808. In 1812 war broke out between the two countries, which continued to rage till a new treaty was concluded in 1814. It is impossible to suggest that the treaty was "continuing in force" in 1813; it necessarily ceased with the commencement of the war. The 37 Geo. 3. c. 97, could not continue in operation a moment longer, without violating the plainest words of the act. William Francis Strudwick became then and remained ever afterwards subject to all the incapacities of alienage.

It was said before the Master, that the first ten articles of the treaty were to be "permanent," which was construed as synonymous with "perpetual;" but that is a construction which the twenty-eighth article does not admit of. The very first article is, "that there should be a firm and universal peace between Great Britain and the United States;" that is the first of the articles supposed to be ever-enduring. Yet, what became of it in 1813? There are many of the stipulations of the first ten articles, which could not possibly be observed in a state of war. The word "permanent" is used, not as synonymous with "perpetual or everlasting," but in opposition to a period of duration expressly limited. The greater number of the articles of the treaty were to cease at the expiration of twelve years; the first ten were not to expire then, by the mere lapse of time; they were to continue so long as a treaty of peace was in force;

but when war took the place of peace, and the treaty had no longer any existence, the ninth article could not continue in operation.

Even if it were to be held, in consequence of the language of the twenty-eighth article, that the intention of the framers of the treaty was to make the ninth article perpetual, there is nothing in the act of parliament to give it that endurance. The act makes no mention of the twenty-eighth article of the treaty, which remains, therefore, a mere stipulation of the crown, and cannot create or extend an exemption from any disability imposed by the law of the land. The continuance of the exemption could not be prolonged beyond the duration of the act: the act was to endure only so long as "this treaty," that is, the treaty of amity, commerce and navigation concluded between his majesty and the United States of North America, should be in force; and, most unquestionably that treaty was not in force when his majesty and the United States were carrying on hostilities against each other both by sea and land.

The construction contended for on the other side would lead to most inconvenient results. One consequence of it would be, that all the lands which, on the 28th of October 1795, belonged to Americans, are taken for ever out of the operation of the general law of England, and may, in all time to come, be transmitted to aliens by descent, devise or conveyance.

Mr Wigram, in support of the same line of argument, submitted that the treaty could not be deemed to be in force, unless it was in force as a whole; that it could not be in force as a whole, after the most important provisions in it had been broken; and, on the contrary, that it ceased to be in force as a whole, when the peace, the stipulation for which constituted the basis of the arrangement, was exchanged for a state of war. He cited Vattel, Book II. c. 13, s. 202—"We cannot consider the several articles of the same treaty as so many particular and independent treaties: for though we do not see the immediate connexion between every one of these articles, they are all connected by this common relation, that the contracting powers pass them with a view to each other, by way of compensation. I should never, perhaps, have passed this article, if my ally had not granted me another, which, in its own nature, has no relation to it. Every thing comprehended in the same treaty has then the force and nature of reciprocal promises, at least if they are not excepted in due form. Grotius says, very well, that all the articles of a treaty have the force of conditions, which by a default are rendered null."

Mr Preston and Mr Dixon, Mr Tinney and Mr Garratt, in support of the title.

The treaty contains articles of two different descriptions; some of them being temporary, and others of them being intended to be of perpetual obligation. Of those which were temporary, some were to last for a limited period; such as the various regulations concerning trade and navigation; and some were to continue so long as peace subsisted, but, being inconsistent with a state of war, would necessarily expire with the commencement of hostilities. There were other stipulations, which were to remain in force in all time to come, unaffected by the contingency of peace or war. For instance, there are clauses for fixing the boundaries of the United States. Were the boundaries so fixed to cease to be the boundaries, the moment that hostilities broke out? The tenth article provides that debts due to individuals, and moneys which they may have in the

public funds or private banks, shall not be confiscated in the event of war: that is a stipulation which, from the nature of things, as well as from the plain import of the terms, was to be a binding obligation in war as well as peace; for it was only to a state of war that it was at all applicable; and, in sound construction, a similar force must be given to the immediately preceding article, on which the present question arises. It was intended to provide for the inconvenience which must naturally arise from the division of one empire into two independent states, the subjects of each of which hold property situated within the territorial limits of the other; and with that view, it declares that American citizens, who then held lands within the dominions of his majesty, should continue to hold them, and have power to grant, sell or devise them as if they were natives, and that neither they, nor their heirs or assigns, should, in respect of their lands, be regarded as aliens. The effect of it is to exclude, and to exclude for ever, the principle of alienage as to certain persons and certain lands: there is no limitation to its operation; it is not confined to a state of peace, or to the individuals who then held the lands; it includes their heirs and assigns: they, their heirs and assigns are, with respect to such lands, to be considered as natives; and, being considered as natives, their title to hold the lands could not be affected by the breaking out of war between the two countries. The twenty-fourth article tends still further to show that some of the stipulations, and among these, the ninth article, were meant to be of perpetual endurance.

Now the effect of the twenty-fourth section of the act of parliament is to give the force of law to the ninth article of the treaty; and if that article, according to the sound construction of the treaty, was to be of perpetual obligation, the enactment of the legislature, carrying into effect that which the king had agreed to do, but which his prerogative was not competent to accomplish, has declared that Americans, who held lands within the dominions of his majesty on the 28th of October 1795, their heirs and assigns, shall in all time to come hold and enjoy them as natives. It is true that the twenty-seventh section has said, that the act shall continue in force only so long as the treaty of peace continues in force; but that section must necessarily be confined to those stipulations which were either of limited duration, or were in their nature such as to be entirely dependent on the existence of peace.

It has been argued that the recital contained in the 45 Geo. 3. c. 35, and the two subsequent acts, have put a legislative construction on the 37 Geo. 3. c. 95, and have declared that the treaty, and consequently the latter act, had ceased and determined. But the operation of a statute is not to be restrained by the recital of a subsequent statute. Dore *v.* Gray, 2 T. R. 365. Besides, the acts of the 45 Geo. 3. and the following years contemplated only those provisions of the treaty, which related to commerce and navigation, and were to expire at the end of twelve years, unless they were expressly renewed for a further period.

The ninth article was more beneficial to English subjects than to American citizens; and any restriction of its fair operation would be a public mischief, inasmuch as it would naturally lead America to adopt a similar restriction of the reciprocal privilege granted to subjects of the British crown.

Suppose that an American citizen who, on the 28th of October 1795, held lands in England, died, leaving an elder son born in America, and a younger son born in England. Had the treaty and the act not been made,

the younger son, on the father's death, would have inherited the lands: under the treaty and the act the eldest son was heir, and as such, entitled to the property. Is it to be said, that, if a war afterwards break out, his interest is to cease, and a title is to accrue to the crown, which never could have had a pretext of claim, if the devolution of the property had been regulated by the common law?

Mr Bickersteth, in reply.

The Master of the Rolls. The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

The act of the 37 Geo. 3. gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the act of parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace.

I am of opinion, therefore, in favour of the title, and consider that the heirs and assigns of every American, who held lands in Great Britain at the time mentioned in the act of the 37 Geo. 3., are, as far as regards those lands, to be treated, not as aliens, but as native subjects.

After the decision on the point of law, a question was raised, whether, regard being had to the mode in which the property had been dealt with and the title deduced, William Francis Strudwick did, in fact, hold the lands and hereditaments, which were the subject of the contract, on the 28th of October 1795; and on this point a reference was directed to the Master.

Newbold *v.* Roadknight.

Russell and Mylne, 677.

A gift of a sum of money to one, to be paid out of the produce of a real estate, directed to be sold, followed by a gift to others, of the residue of that produce, is substantially a gift of the whole estate, and not a gift of legacies, with a collateral charge upon the estate; and these gifts are adeemed, if the testator sell the estate in his lifetime.

Rolls.—July 26, August 2, 1830.

WILLIAM NORRIS, by his will dated the 24th of January 1824, gave and devised as follows: "I give and devise all my messuages, closes,

lands, tenements and hereditaments, situate, lying and being in Eathorpe in the said county of Warwick, unto William Roadknight and Robert Welchman, their heirs and assigns, upon trust, as soon as conveniently may be after my decease, absolutely to sell and dispose of the same either by public auction or private contract, and either together or in parcels, for the most money and best price or prices that can or may be reasonably obtained for the same; and after defraying thereout the costs, charges and expenses incident to and attending such sale or sales, and in making out good and perfect titles to the purchaser or purchasers thereof, upon trust to pay unto Mr Thomas Newbold of Baggington, the husband of my daughter Elizabeth Newbold, the sum of 3000*l.*, which I hereby give and bequeath to him accordingly to and for his own use and benefit; and then, upon trust to pay and divide the surplus of the said last mentioned purchase-money unto and amongst all and every the child and children of my late son Thomas Norris, and the child and children of my said daughter Elizabeth Newbold, equally to be divided between them, when and as they shall respectively attain their ages of twenty-one years, with benefit of survivorship and accruer amongst them. I give and bequeath unto the said William Roadknight and Robert Welchman the sum of 30*l.* each for their own use and benefit, as a token of my respect and esteem for them. I give and bequeath all my household goods and furniture, plate, linen, china, cattle, stock, crops, money, debts, securities for money, and all other my personal estate and effects whatsoever and wheresoever unto the said William Roadknight and Robert Welchman, their executors, administrators and assigns, upon trust that they do and shall, as soon as conveniently may be after my decease, convert such part thereof as is not in money into money, and collect and call in my debts and securities, and stand and be possessed of the money so to be received and produced, and of the surplus of the money to be produced from the sale of the messuage, closes, lands, tenements and hereditaments which I have lately purchased at Marton, upon trust, in the first place, to pay my just debts, funeral expenses and the expenses of proving and carrying into execution this my will; and then upon trust that they do and shall pay and divide the residue of the said money unto and amongst all and every the child and children of my said late son Thomas Norris, and the child and children of my said daughter Elizabeth Newbold, equally to be divided between and amongst them, when and as they should respectively attain their age or ages of twenty-one years, with benefit of survivorship and accruer amongst them." And he appointed Roadknight and Welchman his executors.

The testator afterwards made a codicil, bearing date the 2d of February 1826, by which, after reciting that the estate at Marton had been conveyed to him, and devising it to Roadknight and Welchman, and their heirs upon the trusts expressed in his will, he gave to a servant a small pecuniary legacy, to be paid within a month after his decease out of his personal estate; and he added, "and I do in all other respects confirm my said last will and testament."

In the interval between the date of the will and the date of the codicil, the testator had sold the lands in Eathorpe, and conveyed them to the purchaser; and the question in the cause was, whether the bequest of the 3000*l.* to Thomas Newbold was thereby adeemed.

Mr Pemberton and Mr Wakefield, for the plaintiff.

It has been decided, that if a testator bequeaths a sum of money, to be

raised by the sale of a particular estate, and if it happens that at his death he has no interest in that estate, the bequest is nevertheless payable out of his general assets. Fowler *v.* Willoughby, 2 Sim. & Stu. 354; Broome *v.* Monck, 10 Ves. 597. In Fowler *v.* Willoughby the money could not be raised by the sale of the estate, because the contract of purchase, into which the testator had entered, could not be completed; here it cannot be raised in the particular mode pointed out by the will, because the lands have been converted into money in the testator's lifetime; but the difference in the mode in which the specific fund happens to fail does not constitute any essential distinction between the cases. If the testator had bequeathed to Thomas Newbold 3000*l.* to be raised by the sale of the lands at Eathorpe, the legacy would not have failed by reason of the circumstance that the testator afterwards parted with all his interest in those lands; and where is the substantial difference between a direction to pay to a man 3000*l.* to be raised by the sale of certain lands, and a direction that trustees, to whom those lands are devised upon trust to sell, shall, out of the proceeds, pay to him the same sum?

The language of the codicil strengthens the claim of the plaintiff. The testator there says, that in all other respects he confirms his will; and one of the points on which this will is thus declared to be confirmed, is the gift of 3000*l.* to Thomas Newbold.

Mr Tinney and Mr Jeremy, contrà.

The words of confirmation in the codicil cannot give validity to dispositions contained in the will, which had previously failed. Crosbie *v.* M'Doual, 4 Ves. 610; Izard *v.* Hurst, 2 Freeman, 224. When the testator sold the lands in Eathorpe, and conveyed them to the purchaser, his devise of these lands to trustees necessarily failed; and the trusts which had been declared of the money to arise from the sale of them, could no longer take effect. Page *v.* Leapingwell, 18 Ves. 463; Hancox *v.* Abbey, 11 Ves. 179. The present case is governed by the decision in Arnald *v.* Arnald, 1 Bro. C. C. 401.

Mr Harwood, for formal parties.

August 2.—The Master of the Rolls. The gift to one of a sum of money, part of the produce of real estate directed to be sold, followed by a gift of the residue of the purchase-money to others, is substantially a gift of the estate, and not a gift of legacies with a collateral charge upon the estate. This distinguishes the present case from Fowler *v.* Willoughby: and the legacy of 3000*l.* to Thomas Newbold is therefore adeemed.

Driver *v.* Ferrand.

Russell and Mylne, 681.

In order to exonerate the personal estate from the payment of debts, there must appear upon the whole will a manifest intention to that effect.

Rolls.—July 30, August 2, 1830.

THE will of John Jackson was to the following effect:—"I, John Jackson, of Guiseley, &c. do make and declare this my last will and testament,

in manner and form following: and, first, as touching the disposition of my real estate, I give and devise the same as follows; (that is to say)"—He then devised certain closes to John Ferrand in fee; and proceeded as follows:—"And as for and concerning the hereinafter mentioned messuages, lands, tenements and hereditaments which I give and devise to John Ferrand, it is my will to charge, and I hereby make chargeable, the same and every part thereof with the payment, yearly and every year, of the sum of 5*l.*, the first payment to be made in one year from the day of my decease, and to be continued yearly afterwards, until all claims and demands whatsoever against all or any part of my estate be and are liquidated, paid and satisfied, and when and as soon as that is the case, then the said yearly payments of 5*l.* shall cease. And I give and devise, subject, nevertheless, to the said payment yearly of 5*l.*, unto the said John Ferrand and his assigns for and during the term of his natural life, all those seven closes of land called Shaw Sides; also all those two closes of land called the Allotment; and also all that other close of land called Wills Gills; and also all that my dwelling-house, together with barns, stables, and other outbuildings thereto adjoining and belonging; also all those two pieces or parcels of ground adjoining my dwelling-house, called the Crofts, (all the said last mentioned property is situate, lying and being in Guiseley aforesaid, and in my own occupation), to have and to hold the said last-mentioned premises, and every part thereof, with their and every of their rights, members and appurtenances to him the said John Ferrand and his assigns for and during the term of his natural life;" with remainder to his first and other sons in tail male; remainder to the right heirs of John Ferrand. "As also," continued the testator, "for and concerning all other my messuages, cottages, closes, lands, tenements and hereditaments whatsoever, lying and being in the county of York, and in whose tenures and occupations soever the same and every part thereof may be, with their and every of their rights, members and appurtenances, unto the said John Ferrand and David Smith, and their heirs, in trust to take and receive, and it is my will that they do, shall and may take and receive the rents, issues and profits arising from and out of the same, and apply the moneys so arising for the liquidating, paying off, and discharging and satisfying all and every the just debts, claims and demands, of what nature or kind soever the same may be, against all or any part of my real estate, whether the said debts, claims and demands be or are on promissory notes, mortgages, or otherwise; and also for liquidating, paying off, and discharging and satisfying the several sums of money which I give and bequeath as legacies, as well as funeral and testamentary expenses, which my executors may incur in the execution and performance of the trusts hereby in them reposed; and when and as soon as all debts, claims and demands as aforesaid are liquidated, paid off, discharged and satisfied, then I give and devise all that part of my real estate so left in trust as aforesaid as follows; (that is to say," &c. The testator next devised two closes to his cousin Christopher Driver for life; remainder to the first and other sons of Christopher Driver in tail male; remainder to the right heirs of Christopher Driver. "And as for and concerning all other my messuages, cottages, mills, closes, lands, tenements and hereditaments, not herebefore given and devised whatsoever, lying and being in the county of York, in whose tenures or occupation soever the same are or be, whereof I am in anywise seised, or have power to dispose, and whereto or wherein I am in anywise entitled or interested, of or for any estate of freehold or inheritance in possession, reversion or expectancy, I give and devise the same and every

part thereof, with their and every of their rights, members and appurtenances, unto my cousin John Driver for life;" remainder to the first and other sons of John Driver, successively, in tail male; remainder to the right heirs of John Driver. Powers of leasing were next given to the persons, who, under the preceding limitations, should have an estate in possession in any of the devised premises; and the will then proceeded, "and as touching my personal estate, I dispose thereof as follows (that is to say): all my household furniture of every description, farming stock, as hay and corn, milch cows, horses, manure, implements of husbandry, and whatever may be on the premises belonging to me at the time of my decease, as well as all moneys, securities for moneys, and arrears of rent, I give and bequeath the same and every part thereof to the said John Ferrand; also I give and bequeath to Ann Ferrand, daughter of the said John Ferrand, the sum of 100*l.*, to be paid to her by my executors on her attaining the age of twenty-one years; also I give and bequeath to Sarah Neale the sum of 20*l.* to be paid to her by my executors in twelve months after my decease; also I give and bequeath to the trustees for the time being of the Guiseley sunday school the sum of 100*l.*, to be paid to them by my executors as soon as convenient after my decease; the said sum of money I give for the purpose of liquidating the debt on the said school; also I give and bequeath to William Whitfield, now or late of Schenmitz in Saxony, the sum of 5*s.*, to be given to him by my executor when called upon for that purpose; also I give and bequeath to each of my executors the sum of 50*l.*; and I do nominate and appoint the said John Ferrand and David Smith executors of this my last will and testament; and it is my will and mind that the said John Ferrand and David Smith, their heirs, executors and administrators respectively, shall deduct and receive to their own uses out of the rents and profits of that part of my real estate set apart for such purposes as aforesaid, all their reasonable costs and charges in and about the management and performance of the trusts hereby in them reposed concerning the same."

The question in the cause was, whether the personal estate was exempted from the payment of all debts, funeral expenses and legacies?

It was argued by Mr Pemberton, on the one side, and by Mr Bickersteth, on the other.

In support of the proposition, that the real estate was intended to be the primary fund for the payment of debts, funeral expenses and legacies, Bootle *v.* Blundell, 1 Mer. 193; Greene *v.* Greene, 4 Mad. 148; Michell *v.* Michell, 5 Mad. 69, were cited.

On the other hand, it was said that the present case was distinguishable from the cases cited, by the particular frame and phraseology of the will; in particular, there was here no direction for the sale of any part of the real estate, and it was by his executors that the legacies were to be paid. The latter circumstance raised a presumption, in favour of the general rule of law, that the legacies were to be borne by the personal estate as the primary fund.

August 2.—The Master of the Rolls. In order to exempt the personal estate there must be clear intention; and I think such intention is to be found in this will. In an early part of the will, the testator devises certain real estates to John Ferrand and David Smith, whom he afterwards names executors, in trust "for the liquidating, paying off and discharging and satisfying all and every the just debts, claims and de-

mands of what nature or kind soever the same may be, against all or any part of my real estate, whether the said debts, claims and demands be or are on promissory notes, mortgages or otherwise; and also for liquidating, paying off, discharging and satisfying the several sums of money which I give and bequeath as legacies, as well as funeral and testamentary expenses, and the expenses which my executors may incur in performance of the trusts hereby reposed in them; and when and so soon as all debts, claims and demands as aforesaid are liquidated, paid and satisfied," he gives and devises, in manner therein mentioned, the real estates so charged. It would at first seem, that he meant to charge this part of his real estate only with debts which, in their nature, affected real estate; but inasmuch as he enumerates debts which do not in their nature affect real estate, and charges these estates expressly with legacies, and funeral and testamentary expenses, and the expenses of his executors in the execution of his will, it must be intended that he meant to charge these real estates with all debts.

In a subsequent part of his will he uses the following expressions:— "And as touching my personal estate, I dispose thereof as follows; that is to say, all my household furniture of every description, farming stock, as hay and corn, milch cows, horses, manure, implements of husbandry, and whatever may be on the premises belonging to me at the time of my decease, as well as all moneys, securities for moneys, and arrears of rent, I give and bequeath the same, and every part thereof, to the said John Ferrand." It would be, therefore, utterly inconsistent with the intention here expressed, that this personal estate should be applied to the payment of the debts, in exoneration of the real estate before charged with them.

The testator afterwards gives certain pecuniary legacies, to be paid by his executors; but it is to be recollected that his executors were the trustees of the real estate charged with the legacies: and that he had here in view the real estate, is to be inferred also from a direction which follows, that his executors are to retain out of the real estate their costs and charges incurred in the execution of their trust. Upon the whole, I am of opinion that it was the manifest intention of this testator, that the real estate, devised for that purpose, should exonerate the personal estate, in favour of the specific legatee of that estate, from all debts and other charges, to which the personal estate is by law previously liable.

David *v.* Rees.

Russell and Mylne, 687.

A testator having by his will given an interest for life in a sum of stock to two persons, and the survivor of them, with remainder to another for life, and afterwards to the children of such other person, by a codicil substitutes an annuity nearly equal to the amount of the dividends of the stock, in the place of the first gift: the gift in remainder is not thereby accelerated; but its value is to be computed according to the price of the stock, at the time of the testator's death, when, but for the substitution, the gift of the prior life interest would have taken effect.

Rolls.—July 30, August 2, 1830.

JOHN COOK, by his will dated the 21st of January 1803, gave as follows: "I order and direct my executors hereinafter named, to pay and

apply the interest, dividends and produce of 600*l.* sterling, now invested in the funds of this kingdom, unto my father and mother, Thomas Cook and Jennett Cook, for their natural lives, and the life of the survivor or longest liver of them both, by equal half-yearly payments ; the first payment thereof to be made within six months next after my decease : and my will is, that the said annuity shall be paid unto the said Thomas Cook and Jennett Cook free of taxes and all other deductions, parliamentary or otherwise : and from and after the several deceases of the said Thomas Cook and Jennett Cook, I give and bequeath the interest and dividends of the said sum of 600*l.* unto my sister Mary, the wife of Watkin David, for and during the term of her natural life, to be paid her free and clear of all taxes and deductions, by equal half-yearly payments ; and from and after the decease of the said Mary David, my will and meaning is, that my executors hereinafter named shall apply, distribute and dispose of the said principal sum of 600*l.* unto all and every the children of my sister Mary David, equally to be divided among them share and share alike."

The testator afterwards made a codicil to his will, dated the 12th of September 1803, in the following words : "This is a codicil to my last will and testament, and which I desire may be construed and deemed as part thereof. I give, and devise, and bequeath unto my father and mother, residing in Wales, the yearly sum of 30*l.* sterling, and to the survivor of them, for and during their natural lives, in lieu of what I have given them in and by my last will and testament."

There were two questions in the cause : first, whether the gifts to Mary David and her children were accelerated by the codicil, so that Mary David took an immediate life interest upon the death of the testator ; and, secondly, whether the value of 600*l.* in stock was to be computed at the price which the stock bore at the death of the testator, or at the time when the legacy was due.

Mr Pemberton and Mr Richards, for the plaintiffs.

By the will of the testator as much stock is to be separated from the general mass of his assets as would then be purchased with 600*l.* sterling; and the fund thus created, subject to the life interests bequeathed to his father and mother, is given to his sister during her life, with remainder to her children. The codicil annihilates the life interests bequeathed to the testator's father and mother: and as it was only for their sakes that the enjoyment of the income by the sister and her family was postponed, the effect of this annihilation is to accelerate the ultimate bequests. The fund must be separated from the general assets within a year after the death of the testator. Why should the separation have been directed to be made, if those for whose sake it is to be made are not to have the enjoyment of it till a period much more remote ?

It was argued, contrà, that the codicil had no object except to fix the income of the testator's father and mother at a sum certain, instead of leaving it, in some measure, subject to contingencies ; that the will had expressly declared that the interests of the sister and her children were to commence only at the death of the survivor of the father and mother; that to make them take effect from the death of the testator would be doing great violence to the language of the bequests ; that the fund ought not to be separated from the assets till the purpose for which it was given rendered separation necessary ; that the necessity did not arise till the death of the survivor of the father and mother ; and, that the amount of

stock, to which the sister and her children were entitled, was so much as 600*l.* sterling would have purchased at the time of the death of such survivor.

August 2.—The MASTER of the ROLLS. The gift to Mary David being in express terms after the death of the survivor of Thomas Cook and Jennett Cook, I cannot infer that the testator meant an immediate gift to her, merely because he has substituted another provision for Thomas Cook and Jennett Cook, which differs little from the prior life estate given to them, except in the certainty of the amount.

The gift to Mary David and her children is of so much stock as 600*l.* sterling would have purchased at the death of the testator, when the life interest first given to the Cooks was to commence.

Lear *v.* Leggett.

Russell and Mylne, 690.

Where stock was given upon trust for A. for life, and after his decease, for his children, with a proviso, that A.'s life interest should not be subject to any alienation or disposition by sale, mortgage or otherwise, in any manner whatsoever; and in case he should charge, or affect to charge, affect or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled: Held, that on A.'s bankruptcy, his life interest passed to his assignees, to the exclusion of his children.

July 26, 1830.

A TESTATOR bequeathed to trustees a sum of 23,333*l.* 6*s.* 8*d.* three per cent consols, upon trust for his wife for life; and after her decease, upon trust for his son and daughters, Alexander Goudge, Elizabeth Bathe and Sarah Saunders, in equal shares, for their respective lives; and immediately after the decease of his son and daughters respectively, he directed that one-third part of the stock should be paid and transferred equally unto and amongst all the children *per stirpes*, and not *per capita*, of his son and daughters respectively who should live to attain the age of twenty-one years; and after the several deceases of the testator's wife and the parents of such children, the trustees were directed to receive the dividends accruing upon the respective shares of the children, and to apply the same for their maintenance and education, till their shares of the principal should severally become payable. The will also contained this clause,—"Provided always nevertheless, and my mind and will is, that the several provisions hereinbefore and hereinafter given for my said son and daughters during their respective lives shall not, nor shall any part thereof respectively, be subject to any alienation or disposition by sale, mortgage or otherwise, in any manner whatsoever, or by anticipation of the receipt; and in case they, or any, or either of them shall charge, or attempt to charge, affect or encumber the same, or any part or parts thereof respectively, then I do declare it to be my express will and meaning, that any such mortgage, sale, or other disposition or incumbrance, so to be made by them, or either or any of them, on his, her or their life annuity,

interest, or provision shall operate as a complete forfeiture thereof, and of all benefit therein, during the remainder of their respective natural lives, and the same shall devolve upon the next successor, or person or persons in expectancy, as if he, she or they were then actually dead."

The testator died in the year 1806, and his widow died in 1821, leaving Alexander Goudge, the son, then of age. In the month of March 1828, Alexander Goudge became a bankrupt. The only question was, whether, under the proviso in the will, the bankruptcy operated as a forfeiture of the bankrupt's life interest in his share of the dividends, for the benefit of his children, or whether that interest passed under the commission?

The Vice-Chancellor having decided that the bankrupt's interest in the legacy passed to his assignees (2 Sim. 479), an appeal was brought from his honour's decree.

Mr Horne and Mr Knight, for the appellants, the children of Alexander Goudge.

The Solicitor-General and Mr Wigram, for the assignees.

On the one hand, it was said that the subject matter of the gift being personal estate, the construction was relieved from technical niceties; and the only question was, whether the intention to deprive the legatee of the power of alienation, and to devest him of the property, in case any attempt should be made to curtail or fetter his enjoyment of it personally, was expressed with sufficient clearness to justify the court in giving it effect. The first words of the proviso, "that the several provisions shall not, nor shall any part thereof, be subject to any alienation or disposition by sale, mortgage or otherwise in any manner whatsoever," were extremely strong, and were large enough, standing alone, to extend to the alienation produced by bankruptcy. Could it be denied that if the bankrupt's interest were held to pass under the commission, that would be to make it subject to an "alienation or disposition?" Upon the subsequent words, which declared that any such mortgage, sale, or other disposition by the tenant for life should operate as a complete forfeiture, the authority of Dommett *v.* Bedford, 6 T. R. 684, 3 Ves. 149, recognized and fortified as it had recently been by Cooper *v.* Wyatt, 5 Mad. 482, was conclusive. Those cases, indeed, went further, inasmuch as in them were not to be found the strong introductory words which, in construing the alienations or dispositions afterwards referred to, gave here a key to the testator's meaning, and amounted to an absolute prohibition against alienation of every kind. It was a narrow view of the subject, and one which had been exploded in Cooper *v.* Wyatt, to consider the alienation consequent on a commission of bankrupt as involuntary. An act of bankruptcy was as much the act of the party as any thing he could do: it was the necessary result of his own conduct; all its consequences, and, among the rest, the commission and assignment, were solely referable to him.

On the other hand, it was argued, that a marked difference existed between words imposing a total prohibition, and words which merely prohibited alienations of a particular description, as for example, an alienation caused by the party's own act. Even where the prohibition was general, it could be of no avail, unless accompanied and enforced by a clause of forfeiture commensurate with the prohibitory words; for the rule had long been settled that every restraint on alienation, annexed to a gift of

property to a person *sui juris*, and not coupled with a declaration that the attempt to alien should determine the donee's interest, was simply void. The appellant's claim must, therefore, rest upon the second member of the proviso, but that fell greatly short of the former, as it only imposed the penalty of forfeiture in case of any mortgage, sale, or other disposition being made *by* the tenant for life, that is, by his own direct and immediate act. Clauses of forfeiture, especially where they tend to defeat the rights of creditors, were viewed with jealousy, and were always to be construed strictly. A commission of bankrupt, besides, was a proceeding *in invitum* (in that respect differing from a declaration of insolvency), and, in the alienation which it wrought, the bankrupt passively submitted to the compulsory operation of the law. This distinction between voluntary and involuntary acts, taken by sir W. Grant in Shee *v.* Hale, 13 Ves. 404, was followed up by the same judge in Wilkinson *v.* Wilkinson, Coop. C. C. 259, 3 Swan. 515, and afterwards received the sanction of sir T. Plumer. The words in Dommett *v.* Bedford (incorrectly stated in the marginal note) were large enough to include every kind of alienation; nevertheless that decision had been questioned, 3 Ves. 149. Cooper *v.* Wyatt was an extremely special case, depending upon peculiar circumstances and expressions which prevent it from being an authority.

The Lord Chancellor said, that here the clause of forfeiture applied only to the prohibition against the acts of the parties themselves; "in case any or either of them shall charge or attempt to charge, affect, or encumber the same," then the property was to go over. The prohibition in Dommet *v.* Bedford was expressed in much more general and comprehensive terms, and might well be construed to extend to alienations by act of law; yet even there the point had been considered doubtful. The same distinction which the Master of the Rolls had stated in Shee *v.* Hale, had been subsequently much discussed, and was approved in Wilkinson *v.* Wilkinson. The decree of the Vice-Chancellor must, therefore, be affirmed(*a*).

Egerton *v.* Jones.

Russell and Mylne, 694.

AN exception to a report in favour of the title having been on argument allowed, leave was given to the plaintiff, some time afterwards, to go again before the Master, for the purpose of bringing evidence to show that the objection which the court had sustained, was, in the circumstances, immaterial.

August 5, 1830.

(*a*) Yarnold *v.* Moorhouse, ante, 467. Some other authorities are cited in Cooper *v.* Wyatt, 5 Mad. 482; and in Mr Simon's report of the principal case, 2 Sim. 479.

Portman *v.* Mill.

Russell and Mylne, 696.

WHERE the report is in favour of the title, the court, on allowing exceptions to it, will give the vendor a reasonable time within which to remove the objection, although the exceptions and further directions were set down to come on together.

March 19, 1831.

Hungate *v.* Gascoigne.

Russell and Mylne, 698.

To a bill by one who claimed estates, either as heir *ex parte maternâ* of G., the person last seised, or as a remainder-man under the limitations of some prior settlement, charging that G. had only a life interest in the property, as would appear if the contents of a certain deed executed in 1730, and within the power of the defendant, were set forth, and praying, besides discovery in aid of ejectment, the removal of outstanding terms, and other relief connected with the action at law; a plea, that in 1766, G. being then tenant in tail in possession, duly suffered a recovery of the estates in question to the use of himself in fee, and subsequently devised them to the defendant, but taking no notice of the deed of 1730, and not stating any part of its contents, was overruled.

February 9, August 2, 1830.

THE bill stated that sir Philip Hungate of Saxton, was in his lifetime seised in his demesne as of fee of and in the manor of Sherborne, and certain other real estates in the county of York, forming part of the ancient patrimonial property of the Hungate family; that he married, and had issue an only son, Francis; that Francis Hungate had issue two sons, Francis and William (from the latter of whom the plaintiff claimed to be lineally descended, and to be heir male of the body); that the last-mentioned Francis became sir Francis Hungate, Bart., and had three children only, namely, Philip, Francis and William, of whom the two latter died without issue; that the last-mentioned Philip, afterwards sir Philip Hungate, Bart., had issue Francis, his eldest son (who succeeded to the baronetcy), Philip and Charles; that the last-mentioned sir Francis Hungate had issue a daughter only, Mary Hungate, and died without issue male, whereupon the baronetcy devolved successively upon his younger brothers Philip Hungate and Charles Hungate, both of whom died without issue; that Mary Hungate intermarried with sir Edward Gascoigne, and that Thomas Gascoigne, afterwards sir T. Gascoigne, Bart., was the only issue of that marriage, who survived her; that sir T. Gascoigne died without issue and intestate in the year 1810; that upon the death of sir T. Gascoigne, the plaintiff became and is his heir at law *ex parte maternâ*, being lineally descended from the first-mentioned sir Philip Hungate; for that the said William Hungate, the second son of the said Francis Hungate, the first baronet of that name, and only son of the first sir Philip, had issue two

sons, Raufe and Thomas Hungate, of whom the former died without issue, and Thomas married, and had issue two sons; that of these, Thomas, the eldest, died without issue, and John, the second, who was the plaintiff's grandfather, had issue an eldest son, William, who married Elizabeth Armin, and died leaving the plaintiff, his eldest son, and heir at law, and also the heir male of the body, and right heir of sir Philip Hungate, the first baronet, and heir at law *ex parte maternâ* of sir T. Gascoigne; that sir T. Gascoigne died in some manner seised of the manor of Sherborne, and the other estates in the bill mentioned, and that the same had, either by descent or by some settlements or limitations unknown to the plaintiff, in some manner descended or been transmitted from sir Philip Hungate, the first baronet, through the several degrees of the Hungate family, on the eldest son, until they came to sir T. Gascoigne, as the representative of the Hungate family by female descent as aforesaid, but how or in what manner, or whether by virtue of any limitations or entails, and for what estate or interest, the plaintiff is unable to set forth; that sir Philip Hungate, the first baronet, or some other of the before named persons in the direct line of the Hungate family, ancestors of sir T. Gascoigne, by some settlements or devises, limited the estates in question in such manner as to create some limitations thereof to the heirs male of the body of sir Philip Hungate, or of the said William Hungate, the second son of the said Francis, or to the use of some of the before-mentioned lineal ancestors of sir T. Gascoigne; and that by virtue thereof the plaintiff, on the death of sir T. Gascoigne without issue, became, either by the failure of issue male, or the failure of issue of the bodies of the persons comprised within the prior limitations of such settlements or devises, entitled to the estates in question as heir male of the body of sir Philip Hungate, or heir male of the body of some other of his (the plaintiff's) said lineal ancestors.

The bill charged, that after the intermarriage of Mary Hungate with sir Edward Gascoigne, indentures of lease and release, bearing date March 1730, and expressed to be made between sir E. Gascoigne and dame Mary his wife, of the first part, dame Mary Hungate, widow of the second part, and divers other persons to the plaintiff unknown of the third and fourth parts, were made and executed, of the recitals, limitations and material particulars whereof the plaintiff was ignorant; but he charged, that the said indentures comprised the manor of Sherborne, and the other patrimonial estates of the Hungate family, and that dame Mary Gascoigne had no power to settle or limit the estates therein comprised, she having only a life estate therein, expectant on the decease of her uncle sir Charles Hungate, Bart., or otherwise an estate-tail, subject to divers limitations over, which estate-tail vested in the plaintiff on the decease of sir T. Gascoigne without issue; that by virtue of some limitation contained in the said indentures, the plaintiff, on the failure of issue of sir T. Gascoigne, became entitled to the manor of Sherborne, and the said other estates comprised therein, and in particular that it appeared therefrom, or from some recitals therein, that sir T. Gascoigne took thereby or was otherwise entitled to an estate for life only in the said estates: that the said indentures were duly enrolled of record in the court of quarter sessions for the West Riding of the county of York, but that the record thereof, as the plaintiff on inquiry discovered, has been wrongfully abstracted or removed by some person unknown, and the plaintiff is now unable to obtain an inspection thereof, although the same would materially assist him in establishing at law his title to the said estates: that sir T.

[Hungate *v.* Gascoigne.]

Gascoigne died seised in fee of the manor of Sherborne, and the other patrimonial estates of the Hungate family, and on his death, intestate and without issue, the plaintiff became entitled thereto as his heir at law *ex parte maternâ:* that besides the Hungate estates, sir T. Gascoigne died seised in fee-simple of certain other estates, which he acquired by purchase, to which, on his death intestate and without issue, the plaintiff became entitled as his heir general: that in the year 1810, upon the death of sir T. Gascoigne, the defendant Richard Oliver Gascoigne, who was a stranger in blood to sir T. Gascoigne, but who has recently assumed the name of Gascoigne, entered into possession of the manor of Sherborne and the said other estates; that the plaintiff had recently brought an action of ejectment in the king's bench against the said R. O. Gascoigne for the recovery of the said manor and estates, but he has lately discovered that there are divers legal estates and terms for years of and in the said manor and estates, and in particular a certain term for 400*l.* years, now outstanding and vested in some persons unknown as trustees thereof, or which the said R. O. Gascoigne has procured to be assigned to himself, or to a trustee for him, or the deeds creating which are now in the hands of the defendant; and the plaintiff cannot, therefore, proceed to trial without the assistance of a court of equity in removing the said impediments, and that the defendant ought to be restrained from setting up the same; and that by reason of such outstanding legal estates, the title of the plaintiff has become and is of an equitable nature, and is peculiarly fitted for the cognizance of a court of equity.

The bill also set forth a great variety of other charges and pretences. In particular, it charged that it was impossible for the plaintiff to proceed with effect to the trial of any action at law, for the recovery of the Hungate estates, until the defendant had made a full discovery and disclosure touching the several matters aforesaid; that if sir T. Gascoigne ever did levy a fine or suffer a recovery of the Hungate estates, the same was void and inoperative, inasmuch as he had not in him any such estate or interest as enabled him to bar the ulterior limitations and defeat the rights of the plaintiff; that the defendant was in possession of the title-deeds of the estates in question, and in particular of the indentures of 1730, and that the plaintiff, as heir of sir T. Gascoigne, was entitled to call for the production and inspection of those deeds, so far as they tended to make out or support his title; that the defendant had in his possession or custody divers family or other settlements or devises containing limitations, in virtue of which the said estates, or some of them, were in some manner limited to the plaintiff, as heir male or right heir of the aforesaid baronets or one of them, or as lineal representative of the Hungate family; that the defendant was concerned in, or was privy to, the abstraction of the record of the indentures of 1730 from the registry, and knew what had become of such record, or was in possession thereof, or of some counterpart, or that he had made away with or suppressed the same.

The bill, in addition to a full discovery and disclosure, prayed a production and inspection of all deeds and instruments in the custody or power of the defendant relative to the said estates, and that the same might be particularly set forth in a schedule; that the defendant might be restrained from setting up any outstanding terms in bar of the pending or any future ejectment brought by the plaintiff; that an issue or action respecting the matters aforesaid might be tried under the order of the court, with such directions and provisions as might be deemed reasonable; and that, in the

event of the plaintiff obtaining a verdict, he might be put into the possession and enjoyment of the estates, and the defendant be ordered to deliver up to him all the title-deeds and other muniments of title, and also to account for the rents and profits thereof, received for six years preceding the pending action of ejectment, and that an injunction and receiver might be granted in the mean time.

To this bill the defendant, R. O. Gascoigne, put in a plea which, in substance, stated, that sir Thomas Gascoigne, in and before the month of April 1766, was seised for an estate of inheritance in fee tail in possession, of and in the manner of Sherborne, in the bill called the ancient patrimonial estate of the Hungate family; and that being so seised and in possession, an indenture of bargain and sale thereof, bearing date the 2d day of April 1766, was duly made and executed by and between the said sir T. Gascoigne, baronet, therein described as only surviving son and heir as well of sir Edward Gascoigne, baronet, deceased, as of dame Mary, his wife, also deceased, of the first part, sir W. W. Bagot, baronet, of the second part, and W. A. Darwin, gentleman, of the third part; whereby, after reciting that by virtue of the settlement made some time after the marriage of the said sir Edward Gascoigne and dame Mary his wife, in pursuance of certain precedent articles, or by virtue of the said sir Edward Gascoigne's will, or some other assurance in the law, the said sir T. Gascoigne was seised in fee tail in possession of and in the several hereditaments thereinafter particularized, and which entail he was minded wholly to discontinue, and to gain to himself a fee simple of and in the same hereditaments respectively, it was witnessed, that for barring all such estates tail as aforesaid, and the remainders thereupon expectant or depending, of and in the barony, and several messuages, lands, &c. thereinafter mentioned, the said sir T. Gascoigne, for the nominal consideration therein mentioned, did grant, bargain and sell unto the said W. A. Darwin, his heirs and assigns, all that the barony, manor or lordship of Sherborne, and all those several other manors or lordships therein particularly described, and all that the impropriate rectory of Saxton, and the advowson, right of presentation and patronage of, in and to the parish church of Saxton aforesaid, and all those several messuages, lands, &c. of the said sir T. Gascoigne therein described, to hold the same unto and to the use of the said W. A. Darwin, his heirs and assigns, to the intent that he might thereby become tenant of the freehold of the premises, in order that a common recovery might be suffered of the same before the end of Easter term then next, wherein the said sir W. W. Bagot should be demandant, and the said W. A. Darwin tenant, and the said sir T. Gascoigne vouchee, who should vouch over the common vouchee; and it was thereby declared, that the recovery should enure to the only proper use and behoof of the said sir T. Gascoigne, his heirs and assigns for ever: that the said indenture was enrolled in the court of common pleas, as of Easter term, in the sixth year of the reign of king George III., and was duly registered; and that, in Easter term in the said year, a common recovery was duly suffered of the said barony, manors, or lordships, advowsons, messuages, lands, tenements and hereditaments, with the appurtenances, in the court of common pleas at Westminster, to uses declared thereof in and by the said indenture of bargain and sale, in which recovery the said sir W. W. Bagot was demandant, the said W. A. Darwin tenant, and the said sir T. Gascoigne vouchee, who duly vouched over the common vouchee: that by virtue of the said indenture, the said sir T. Gascoigne became and was

seised of the said barony, manors or lordships, and other hereditaments, to him and his heirs for an estate of inheritance in fee simple, and so continued till the time of his death: that the said sir T. Gascoigne being so seised thereof, and being also seised for an estate of inheritance in fee simple, of and in divers other messuages, lands, &c. whereof he was the first purchaser, and whereof he continued to be seised in fee simple till the time of his death, duly made and published his last will and testament in writing, executed and attested as by law is required for passing freehold estates, and bearing date the 1st day of October 1809, and thereby devised all his manors, messuages, lands, tenements, advowsons and hereditaments whatsoever, to the use of the defendant and his issue in strict settlement, with divers remainders over: that the said sir T. Gascoigne died in the year 1809, without having revoked or altered his said will, and that thereupon the defendant entered into possession of all the manors, messuages, lands, &c. comprised therein and devised thereby, or into the receipt of the rents and profits thereof, and that he or those claiming under him hath or have ever since been and still are in such possession or receipt under and by virtue of the same will.

The plea averred that the barony, manors, lordships and other hereditaments, whereof the said recovery was suffered, were the hereditaments in the bill called the ancient Hungate family estate, and that the hereditaments whereof the said sir T. Gascoigne was thereinbefore mentioned to have been the first purchaser, were the same which in the bill he was stated to have acquired as the first purchaser.

Mr Horne and Mr Monro, for the plea.

This is a fishing bill of the worst description, and entitled to no favour. What the plaintiff says by his bill is tantamount to this,—"I am entitled to these estates in some way or other, and I must trouble you, the party in possession, to tell me how." After tracing the plaintiff's pedigree through a regular course of descent, and deducing his title as heir of the body and heir at law of the first sir P. Hungate, and heir at law *ex parte maternâ* of sir T. Gascoigne, the bill states the death of sir T. Gascoigne intestate, and seised of the estates in question. Sir Thomas's seisin must have been in fee, in tail, or for life; if in fee, the plaintiff claims the property as his heir *ex parte maternâ*, or his heir general; if in tail or for life, then by virtue of the limitations contained in some supposed settlement or devise, to the plaintiff unknown, but within the knowledge and power of the defendant, the property is alleged to have devolved upon the plaintiff as heir at law, or heir of the body of sir P. Hungate, or of one or other of the different persons who were successively owners of the Hungate estates. The answer made to this statement is, that in the year 1766, upwards of sixty years prior to the filing of the bill (a period which, in ordinary cases, gives a good title against all the world), sir T. Gascoigne was tenant in tail in possession of the Hungate estates; that he suffered a recovery, and acquired a fee simple in them in that year, and that he continued to hold them in fee till the time of his death; that sir Thomas was also seised in fee simple of certain other estates which he acquired by purchase, and that being so seised, he effectually devised the whole of his estates, as well those coming to him through his mother, as those of which he was the first purchaser, upon certain trusts for the benefit of the defendant and his issue; and that, from the death of the testator, in 1809, down till the filing of the bill, a period of all but twenty years, the defend-

ant has been in the undisturbed possession of both classes of estates. The allegations with respect to the plaintiff's title are of the most sweeping kind, and the grounds on which he rests it, very various and contradictory. In substance, however, they are all met and traversed by the plea, which stating a seisin in fee tail by sir T. Gascogne in 1766, and a subsequent recovery and devise, completely negatives every right which might be supposed to exist in the plaintiff, whether as a remainder-man in tail or in fee, under the limitations of a prior devise or settlement made by any of the Hungate family, or as the heir *ex parte maternâ* or heir general of the person last seised.

The Vice-Chancellor, in overruling the plea, rested his judgment on a charge, "that under or by virtue of some limitation or limitations in the said indentures of lease and release contained, the plaintiff, upon the failure of the issue of the said sir T. Gascoigne as aforesaid, became, and now is, well entitled to the said manor lands, messuages, tenements and hereditaments therein comprised and thereby settled and limited, and in particular, that it appears from the said indenture or some recital therein, that the said sir T. Gascoigne, as the fact was, took thereby, or was otherwise in right duly entitled to an estate for life in the said Hungate estate." His honour conceived that this was collateral matter, which the plea ought to have gone on to deny. It is submitted, however, that this was principal matter, to which the plea is a sufficient answer. The very point in issue was, what was the nature of sir Thomas Gascoigne's estate? If, as the case supposes, it was for life only, no recovery of his could bar the limitations over. But the plea displaces that supposition, by averring that he was seised in tail; and the averment is perfectly compatible with the allegation, that under the settlement of 1730 he was only tenant for life, since he might well have acquired an estate tail subsequently to that time, and prior to the year 1766. If, for example, the property were limited to sir T. Gascoigne for life, with remainders to his first and other sons in tail, an ultimate remainder, limited to the heirs of the body of his mother, would have given him an estate tail upon her decease.

The bill is not confined to discovery. It alleges that legal terms are outstanding; and that the plaintiff's title is of a peculiarly equitable nature, and cannot be adequately prosecuted or investigated at law; in addition to a full disclosure, it prays the removal of temporary bars, and that in the event of the plaintiff recovering in the ejectment, possession of the title-deeds and the lands may be delivered, and an account be taken of the rents and profits; and it asks for an injunction and receiver in the mean time. Unquestionably, therefore, the suit is for relief; a circumstance which distinguishes it from those cases where, the bill being for discovery and nothing more, the court, in overruling a plea which goes to the denial of the plaintiff's title, has done so expressly on the ground that the effect of allowing the question of title to be litigated and determined in that shape, would be virtually to usurp the jurisdiction of the court of law. Hindman *v.* Taylor, 2 Bro. C. C. 7, 2 Dick. 651; Mendizabel *v.* Machado, 1 Sim. 68; Gait *v.* Osbaldeston, 5 Mad. 428, and 1 Russ. 158, on appeal; and Plunkett *v.* Cavendish, V. C., 2d Nov. 1824(*a*); which, like the present, was a bill for discovery and relief.

(*a*) See post, p. 628.

[Hungate v. Gascoigne.]

The Solicitor-General (sir E. Sugden) and Mr O. Anderdon, for the plaintiff.

In a certain sense this may be called a bill for relief; but the relief is ancillary to the legal remedy, and grows out of it. The account of rents and profits is asked only in the event of the plaintiff succeeding in his ejectment; while the removal of outstanding terms, which has been held to be a species of relief only grantable at the hearing (Beer *v.* Ward, Jac. 194), is a preliminary step, indispensable to the trial and determination of the question at law. This case, therefore, falls within the rule laid down by lord Thurlow in Hindman *v.* Taylor, 2 Bro. C. C. 7, 2 Dick. 651.

This plea is no answer to the bill. The plaintiff's case is, that he is heir *ex parte maternâ* of sir T. Gascoigne, the person last seised, and that either as such heir, or as a remainder-man under the limitations of some prior settlement which sir Thomas had no power to defeat, he became entitled to the estates in question. In support of this case the bill states, that sir T. Gascoigne was tenant for life of the property, as would appear if a certain deed executed in the year 1730 were discovered and produced; and that he could not, therefore, suffer a valid recovery, so as to enable him to make an effectual devise. The plea contains no denial of the fact of the plaintiff being heir *ex parte maternâ*, or of his being entitled to a remainder in tail or in fee under such a settlement as the bill alleges; but it simply states, that by virtue of a recovery duly suffered in 1766, sir T. Gascoigne, being then seised of an estate tail in possession, acquired a seisin in fee-simple, and afterwards devised the property to the plaintiff. That, however, is not enough. The plaintiff has a right to know when and by what means his title, at the particular period to which the defendant's attention is pointed, has been displaced; he has a right to know the nature and limitations of the deed of 1730, and in what way its operation had been defeated. A good title, as far back as the year 1766, will be no defence, if the plaintiff can establish, as it is the object of his bill to procure evidence for establishing, that the recoverer was at that time seised of a life estate only. For that express purpose the charge, as to the existence and provisions of the deed of 1730, has been introduced; a charge which is collateral to the question of title immediately in issue, but which is, or may be, most material with a view to evidence, and of which the defendant has found it convenient to take no notice whatsoever. If issue were taken upon this plea, the defendant would produce the recovery deed and the devise, while the plaintiff would be left without any means of obtaining the information necessary for the purpose of controverting the plea. It is a settled principle in pleading, that all collateral matter charged by way of evidence, and as conducive to the ground of the relief, must be met and answered. Evans *v.* Harris, 2 V. & B. 361; Holt *v.* Lowe, 5 Bro. P. C. 569, Toml. ed.; Leigh *v.* Leigh, 1 Sim. 349.

Mr Monro, in reply.

The Lord Chancellor. The bill, after stating that in the year 1654, sir Philip Hungate was seised in fee of certain property in the county of York, and among the rest of the manor of Sherborne, goes on to deduce a descent from sir Philip Hungate to Mary Hungate, who appears to have been the heiress at law of sir Philip, and who married sir Edward Gascoigne in the year 1730. Of that marriage sir Thomas Gascoigne was the issue. Sir T. Gascoigne died without children, and, as the bill states,

there was no other issue of the marriage of sir E. Gascoigne and Mary Hungate. The plaintiff next proceeds to set out his own title, deducing his descent from William, who was the second grandson of sir Philip, and he states himself to be, after the death of sir Thomas Gascoigne, the heir at law of sir Philip Hungate, and also the heir at law *ex parte maternâ* of sir Thomas Gascoigne. The manner in which he sets out his title to the estates in question is certainly obscure and perplexed ; but the result, as it is to be collected from the whole and from some of the averments in the bill, is this, that sir T. Gascoigne was entitled only to an estate for life, and that after the death of sir Thomas, the property vested in the plaintiff. In his bill the plaintiff states or refers to a settlement executed in the year 1730, upon or after the marriage of sir Edward Gascoigne with Mary Hungate ; and he charges that by virtue of that settlement, and from evidence contained in its recitals, it appears, as the fact was, that sir T. Gascoigne was interested in the property as tenant for life only, and that upon the death of sir Thomas, the whole interest vested in him, the plaintiff. This deed of 1730, he alleges was duly registered by the clerk of the peace of the county of York, where the lands are situated, but the record of it has since been abstracted from the registry. The deed itself, or some copy, or some abstract of it, is, he says, in the possession or power of the defendant, and he prays discovery of its contents in aid of an ejectment which is now depending, and was depending at the time of filing the bill ; and he also prays that the defendant in that ejectment may be prevented from setting up any outstanding terms, or in the alternative, that the court will be pleased to declare the respective interests of the parties.

To this bill the defendant, Richard Oliver Gascoigne, has pleaded, that in the year 1766, and before that time, sir Thomas Gascoigne was seised in fee tail of the property in question ; that he afterwards suffered a recovery, the uses of which were declared to himself in fee ; and that he devised that property by his will to the present defendant.

The question is as to the validity and sufficiency of the plea. In this plea the defendant states a title inconsistent with and subsequent to that which is set up by the plaintiff—subsequent I mean to the date of the deed of the year 1730, of which a discovery is prayed. He entirely passes over the title of the plaintiff ; he passes over all consideration with respect to the deed of 1730 ; and he in no way attempts to connect his own title with that deed.

Now, I am of opinion, after fully considering the case, that,—the defendant relying upon that subsequent title, not connecting it in any way with the ground of the title upon which the plaintiff stands, not denying that title or any substantial part of it, not denying the possession of the deed of 1730, and not denying its existence,—such a plea cannot be sustained. It was incumbent upon the defendant in some way or other to connect his own with the plaintiff's title, or to traverse the grounds of that title, or some substantial part of it ;—to deny the existence of the deed of 1730 ; or if he did not do so, to deny at least that the deed was in his possession, and that he had any knowledge of its contents. The plea, therefore, must be overruled.

Plunkett *v.* Cavendish(*a*).

Russell and Mylne, 713.

A plaintiff, claiming as heiress at law of L., who had devised real estates to various persons in tail, reserving the ultimate reversion to his own right heirs, alleged by her bill, that the several estates tail had determined by failure of issue,—that no valid recovery had been suffered, or if it had, that the property had been so settled that she was entitled as right heir of L.,—and that so it would appear, if the defendant would produce the deeds creating the tenant to the *præcipe*, and leading or declaring the uses of such recovery: a plea, which set forth the substance of the deeds making the tenant to the *præcipe*, and leading the uses of the recovery (under which uses the plaintiff had no title), and of the recovery, was held to be a good defence, though not supported by any answer.

Nov. 2, 1824.

THE bill stated that sir William Lowther, by his will dated in April 1755, devised certain real estates, in the county of Lancaster, to the duke of Devonshire and the marquis of Hartington, and their heirs, to the use of the testator's first and other sons successively in tail mail: remainder to the use of Edward Wilson and Thomas Wilson for a term of two hundred years, upon certain trusts; remainder to the use of Catherine Lowther for life; remainder to the use of lord George Cavendish for life; remainder to trustees to preserve contingent limitations, and then to lord George's first and every other son successively in tail male; in default of such issue, to the use of lord Frederick Cavendish for life; with remainder to trustees to preserve contingent limitations, and then to lord Frederick's first and other sons successively in tail male; in default of such issue, to the use of lord John Cavendish, and the heirs male of his body; and in default of such issue, to the testator's own right heirs:—that the testator died in 1756, leaving no issue: that in 1764, Catherine Lowther died: that lord George Cavendish died in 1794, lord John Cavendish, in 1695, and lord Frederick Cavendish, in 1803, all of them without issue: that lord John Cavendish made a will, by which he devised, among other things, all his estates in the counties of York, Northampton and Lancaster, to such uses as lord Frederick should appoint, and in default of appointment, to lord Frederick for life, with remainder to lord George Henry Cavendish in fee: and that, upon the death of lord F. Cavendish in 1803, the ultimate remainder to sir William Lowther's right heirs took effect; but lord George Henry Cavendish entered into, and had remained in possession of the estates under the will of lord John Cavendish. After deducing the pedigree of the plaintiff as heiress of sir William Lowther, and stating that, as the term of two hundred years, though the trusts of it were satisfied, was still subsisting, she could not assert her claim at law, the bill contained the following allegation: "And the said lord George Henry Cavendish pretends that some recovery was suffered by the said lord John Cavendish as tenant in tail in remainder under the will of the said testator, sir William Lowther; and that some deed was executed to lead or to declare the uses of the said recovery; and that the said lord John Cavendish, by virtue of the said recovery, and of the deed

(*a*) This is the case referred to at page 625.

leading to the uses thereof, became entitled unto the said estates as tenant in fee-simple in remainder; and that, under or by virtue of the aforesaid will of the said lord John Cavendish, the said defendant, lord George Henry Cavendish, became absolutely entitled to the said estates as tenant in fee-simple; the contrary whereof the plaintiff charges to be true, and that no good or valid recovery was ever suffered of the said estates: and if it were, that the estates were so settled, that, in the events which have happened, the plaintiff, as the right heir of the said sir William Lowther, is entitled thereto; and it would so appear, if the said lord George Henry Cavendish would set forth when and in what courts or court such recoveries or recovery of the said estates respectively were suffered, and who were the parties thereto respectively, and by whom the deeds creating the tenants or tenant to the præcipe were respectively executed, and who were the parties to the deeds or deed leading or declaring the uses of such recoveries or recovery respectively, and would produce all such deeds; all of which the plaintiff charges, if they exist at all, are now in possession of the said defendant, lord George Henry Cavendish." The prayer was, that lord George Henry Cavendish might be decreed to deliver up possession of the lands, and to account for the rents and profits; and that the defendants might be restrained from setting up the outstanding term in bar to any proceeding which the plaintiff might take at law.

To this bill lord George Henry Cavendish pleaded, that, lord George Cavendish being so seised (as tenant for life) and in possession of the said premises, and the said lord John Cavendish being so entitled thereto for an estate in tail male in remainder, "certain indentures of lease and release, bearing date respectively the 28th and 29th of January 1766, were duly made and executed; that is to say, the indenture of lease bore date the 28th of January 1766, and was made and executed by and between the said lord George Cavendish and lord John Cavendish of the one part, and William Shaw of the other part; and the said indenture of release bore date the 29th of January 1766, and was made and executed by and between the said lord George Cavendish and lord John Cavendish of the first part, William Shaw of the second part, and John Heaton of the third part, whereby lord George Cavendish and lord John Cavendish did grant, bargain, sell and release unto William Shaw, all and every the manors, messuages, farms, lands, tenements, rents and other hereditaments whatsoever of the said sir William Lowther, or whereof or wherein he or any person or persons, in trust for him or to his use, had any estate of freehold or inheritance in possession, reversion, remainder or expectancy, &c., situate in the county of Lancaster, with their appurtenances, to hold the same unto the said William Shaw and his assigns, for the joint lives of the said lord George Cavendish and William Shaw, to the intent that the said William Shaw might be tenant of the freehold of the said premises, in order that one or more common recovery or recoveries might be suffered thereof, &c.: and it was thereby declared, that the said common recovery or recoveries should enure to the intent and purpose, to corroborate and confirm the term of two hundred years limited by the said will of sir William Lowther; and after the determination thereof, to corroborate, strengthen and confirm the estate, which, by the said will, stood limited to the said lord George Cavendish for his life; with remainder, to corroborate the estate limited by the will, to trustees to preserve contingent remainders; with remainder, to corroborate the estates limited by the said will, to the first and other sons of lord George Cavendish successively in tail male; with

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remainder, to corroborate the estate limited by the said will to the said lord Frederick Cavendish and his assigns for his life; with remainder, to corroborate the estate limited by the said will to trustees to preserve contingent remainders; with remainder, to corroborate the estates limited by the said will to the first and other sons of lord Frederick Cavendish successively in tail male; with remainder to the use of lord John Cavendish, and the heirs male of his body; with remainder to the use of the survivor of lord George Cavendish, lord Frederick Cavendish and lord John Cavendish, his heirs and assigns forever:—that at the Lancaster session of assizes, holden on Saturday the 29th day of March, in the sixth year of George the third, a common recovery was accordingly duly had and suffered of the said premises, in the duchy court of Lancaster, to the several uses declared in and by the said indenture of release hereinbefore set forth, in which recovery the said John Heaton was demandant, the said William Shaw tenant, and the said lord John Cavendish vouchee, who duly vouched over the common vouchee:—that lord Frederick Cavendish survived lord George Augustus Cavendish and lord John Cavendish, and thereupon, under and by virtue of the said indentures of lease and release, and the recovery suffered in pursuance thereof as aforesaid, became and was seised of the said premises to him and his heirs for an estate of inheritance in fee-simple, and so continued until the time of his death:—that the said lord Frederick Cavendish departed this life in the year 1803:—and that thereupon this defendant, under and by virtue of a title duly derived from the said lord Frederick Cavendish, entered into possession of the said premises, or into the receipt of the rents and profits thereof."

Mr Horne and Mr Monro, for the plea.

Mr Sugden and Mr Pemberton, for the bill.

The bill alleges that no valid recovery was suffered, or if any recovery were suffered, that the estate was so settled, that, in the events which have happened, the title is in the plaintiff, and that so it would appear, if the plaintiff would produce all such deeds as are therein mentioned. These charges ought to have been met by an answer. How can a plea of a recovery be a complete answer to a case, which proceeds upon matter *dehors* the recovery? Every averment in the plea may be true; and yet the estate may have been so settled, as to vest the title in the plaintiff.

Mr Horne, in reply.

The Vice-Chancellor (sir John Leach) stated, that the only question was, whether the present case came within the rule, that where there are collateral allegations in the bill sufficient to avoid the effect of the matter relied upon as a defence by way of plea, those allegations must be denied by answer, in order to make the plea an effectual defence; that here the charge in the bill was, that if any recovery were suffered, the estate was so settled that the plaintiff was entitled as the right heir of sir William Lowther; that the plea was a direct denial of that averment, for it set forth the uses of the recovery, and under those uses there could be no such title as was alleged in the bill; and that it was, therefore, evident that the matter charged in the bill, to which the plaintiff argued an answer should have been given, was not collateral to the matter pleaded.

For these reasons his honour allowed the plea.

Simond *v.* Hibbert.

Russell and Mylne, 719.

Lien established against the produce of West India estates in respect of supplies furnished to the estates, upon an agreement implied from the course of dealing and conduct of the parties.
Jan. 25, 26, Aug. 3, 1830.

IN the year 1794, John Tharp, Esq. was the owner of considerable estates and plantations in the island of Jamaica. In the month of December in that year Alexander Campbell, a nephew of Mr Tharp, then residing with him upon one of his estates in Jamaica, communicated to his uncle in conversation his intention of connecting himself in business with some house of agency at New York, and he begged to know how far he might expect Mr Tharp's assistance and support, should such a connexion take place. In reply, Mr Tharp assured him that, in the event of his forming the connexion contemplated, he (Mr Tharp) would send an order to that house for all the supplies wanted for his estates in Jamaica, and would consign to it in return a sufficient quantity of rum, the produce of the estates, to pay for the supplies, and would allow upon the sales the usual mercantile commission. In consequence of that conversation Campbell went to New York, and, in the month of April 1795, was admitted a partner in the house of Simond and Company. Accordingly, acting upon that understanding, Simond & Co. from time to time made shipments of lumber and provisions for the use of Mr Tharp's estates, and received consignments of rum for sale on account of Mr Tharp, and in payment of their shipments. This course of dealing went on during the short time Mr Tharp remained in Jamaica, and was distinctly recognized as a permanent arrangement in several letters written by him to Simond & Co.; and after he quitted the island it was continued as long as he lived, with his sanction, by his attorney, Mr Green, who was the manager of his West India estates.

By his will Mr Tharp devised his estates to certain trustees, of whom Green and another lived in Jamaica, and the rest were resident in England, upon trust to manage and cultivate the same to the best advantage, and after payment of all charges and expenses, to apply the profits and produce thereof in manner therein mentioned, till the testator's grandson, then an infant of tender years, should attain the age of twenty-four. And he further directed that, in order to relieve his trustees from the trouble and responsibility of keeping long and voluminous accounts, an amicable suit should be instituted in Jamaica, for the purpose of annually passing the accounts of the persons who were employed in managing the estates. Upon Mr Tharp's death, which happened in 1805, Mr Green, with the approbation of the other trustees, entered into the possession and management of the plantations, and carried on the cultivation of them, agreeably to the trusts of the will. Under his management exactly the same course of dealing continued between him and Simond & Co., which had existed in the testator's lifetime; shipments of lumber and provisions being made for the use of the Jamaica estates, on the one hand, and consignments of rum in payment of them being sent to New York, on the other. The in-

voices, accounts of sales, and accounts current transmitted by the New York house to the manager in Jamaica relative to these transactions, were uniformly headed, "On the account and risk of and in account with the estate of J. Tharp, Esq., deceased; while certain other transactions, which took place during the same period between that house and Green in his private capacity, were, in their books, kept distinct from the former, and were charged to Green's individual account only.

Under the decree made in the amicable suit, instituted in the name of the infant *cestui que trust* against the trustees, the accounts between Green and the estate were annually examined and passed; and in those accounts Green claimed and was allowed payments on account of a considerable portion, though not the whole, of the shipments made by the plaintiff's house for the use of the estate. The accounts between Simond & Co. and the estate were balanced and settled down to the year 1808, but the dealings continued till the end of the year 1811, at which time a considerable balance was due to Simond & Co. Green shortly afterwards died insolvent; and the war then breaking out between this country and the United States, Simond & Co., who were alien enemies, were unabled to prosecute their claim in the English courts against the trustees at home.

The present bill was subsequently filed by the plaintiff, as the surviving representative of the house of Simond & Co., against the trustees in England, for the purpose of establishing a lien upon the produce of the estate, which had been consigned to this country and sold, and the proceeds paid into court, in a suit for administering the trusts of the will. The prayer was, that an account might be taken of the plaintiff's debt, and that the amount found due might be paid out of the fund in court upon which the lien was claimed.

By the order made at the original hearing, the Master was directed to inquire and state whether, in respect of the supplies furnished by the plaintiff's house for the use of the estate, for which credit had been allowed in the accounts between the estate and the late William Green, the plaintiff was entitled to claim payment from the estate; and also whether, in respect of such supplies furnished during the life of Green, for which no credit had been allowed to Green in those accounts, the plaintiff was in like manner entitled to claim payment from the estate. The Master having found that the estate was still liable to the plaintiff in respect of both descriptions of supplies, the trustees excepted generally to his report; and the exception having been overruled by the Vice-Chancellor, sir J. Leach, they now appealed from that decision.

Mr Horne, Mr Pepys and Mr S. Cullen, for the plaintiff, admitted that the doctrine of implied lien for stores furnished to West India estates had been considerably narrowed by the decision in Scott *v.* Nesbitt, 14 Ves. 438; but they relied in this particular case upon the nature of the contract, explained and confirmed as it had been by the long course of subsequent dealings between the parties. Those dealings, commencing in Mr Tharp's lifetime, and continued upon precisely the same footing after his death, were carried on by the plaintiff's house, solely on the faith of a credit given to the estate. Neither the trustees as a body, nor the manager Mr Green, were separately or personally debited. The supplies were uniformly entered and charged in the invoices and accounts as advances made to the estate itself, and upon the security of its returns. If the

trustees had done their duty, and investigated the accounts of their representative Green, who was himself one of their number, they must have discovered how the fact stood; and Simond & Co. were not to suffer because these gentlemen had allowed themselves to be duped by the knavery of their agent in Jamaica. The report found that considerable shipments of lumber and provisions, of which the estates had reaped the benefit, still remained unpaid; and that a large balance in respect of them was due to the plaintiff. The fund in court consisted in part of the proceeds of consignments of rum, produced by means of those very shipments; without which, indeed, the cultivation of the estate could not have been carried on; and it was only equitable, that that fund should be held liable for the balance. A West India plantation resembled a manufactory or a mining concern, upon the stock and produce of which the parties furnishing the supplies necessary for working it, might either by usage or agreement retain a lien for their reimbursement. The settlement of accounts between Green and the trustees, under the decree of the court of chancery in Jamaica, and in which the former had been allowed credit for payments in respect of the supplies in question, although, in point of fact, he had never paid for them, could not prejudice the rights of the plaintiff's firm, which was no party to the suit, and had no notice either actual or constructive, of the proceedings: still less could such a settlement affect that portion of the demand, for which Green had not sought to make the estate his debtor, and which had never been included in his accounts. The circumstance that, in his private transactions with the house at New York, Green was separately charged as a personal debtor only, was strong evidence to show that the other dealings proceeded throughout upon a common understanding, that they were all carried on, not upon the credit of the trustees, but the security of the estate itself. If a merchant, upon the faith of the consignments being sent to him, shipped stores to a West India plantation, and the owner, notwithstanding, chose rather to remit them to another, the court would interfere by injunction; Bunbury *v.* Winter, 1 J. & W. 255. The contract here was to send so much rum as would be sufficient to cover the value of the shipments, and not a specific value; but that could not vary the principle, though it might render its application less easy.

The Solicitor-General, Mr Pemberton and Mr Rolfe, contrà.

It is admitted that no peculiar usage exists in the West Indies, which of itself creates a lien upon these estates or their produce; and that no charge in favour of the claim has been imposed by the testator's will: but reliance is placed upon an implied agreement, and upon the course of dealing. There is no evidence, however, of agreement with the trustees either express or implied; and if there were, the agreement would be *ultra vires* of the trustees, and therefore inoperative. Green, by the will, had no power to mortgage, even for the working of the estate; of course he could not effect the same thing indirectly by creating an equitable lien on the property. This court recognizes no such lien, unless in the single instance of the vendor of an estate before he receives his purchase-money. Even if Green had been competent to bind the estate and his co-trustees, by acts which go beyond the objects of the trusts, still there is no evidence of any contract on his part; and, if it had been otherwise, his contract could only affect the testator's assets to the extent to which, as trustee and manager under Mr Tharp's will, he was authorized to incur expenditure in the cultivation and improvement of the estates, on behalf of the persons bene-

ficially interested. Ex parte Garland, 10 Ves. 110. After Mr Tharp's death, the dealings, whatever were their nature, were carried on with Green alone in his individual character, and were not communicated to the trustees in England. A creditor cannot be allowed, for the purpose of bettering his security, to pass by his principal debtor and to establish his demand upon a fund to which that debtor may, as a trustee, be himself entitled to resort for his own reimbursement Worrall *v.* Harford, 8 Ves. 4. The notion of a lien upon future crops, to secure the payment of shipments of stores previously made, is quite new, and extremely dangerous in principle. As well might it be alleged that a slopseller in town, who contracts to furnish clothing to the labourers of a farmer in the country, could acquire by the course of dealing an equitable lien upon the crops or the cattle produced upon the farm, and sent for sale to the London markets. In the present case the accounts between the trustees and their agent have been long since settled, and a part of the supplies for which payment is now sought has been already paid for, out of the funds in their hands: to that extent, at least, the estate, having once borne its burthen, must now be held to be discharged. Anon, Salk. 153; Juxon *v.* Brian, P. Ch. 143; Hutchinson *v.* Massareene, 2 B. & B. 49; Oldfield *v.* Oldfield, 1 Vern. 336; Harrison *v.* Cage, 2 Vern. 85, and n., 1 P. Wms, 518, 2 Ves. Sen. 603, 5 Ves. 736.

August 3.—The Lord Chancellor. When this question came originally before the court, it was apparently of a very complicated nature, and a reference was therefore directed to the Master, by which the facts have been disentangled, and it now appears to be an extremely plain case.

In the year 1795, Mr Tharp, the owner of estates in the island of Jamaica, had a nephew of the name of Campbell, who was desirous of entering into partnership with the firm of Simond & Co., at New York, of which firm the plaintiff Simond is the surviving representative, and it was then agreed by Mr Tharp, that if the proposed partnership should be carried into effect, his estates in Jamaica should be supplied with provisions and lumber by the house at New York, and that he in return should pay for those supplies by shipments of rum to be sent from his estates, consigned to the New York house. Certain stipulations were also made with respect to freight and commission. The partnership took effect, and the agreement was acted upon accordingly.

This arrangement was entered into in 1795, and Mr Tharp soon afterwards left Jamaica and came to England, where he resided till his death in 1805. During the whole of the intermediate period, his estates were managed by a person of the name of Green; and, under Mr Green's management, the transactions with the house at New York continued to be conducted upon the footing of the original arrangement. Mr Tharp, by his will, devised his West India estates to trustees for the benefit of his infant grandson. Two of the trustees who acted in the trust resided in Jamaica, and two others who also acted, and of whom the defendant Hibbert was one, were resident in England. William Green, who superintended the West India estates, was appointed one of those trustees, and he remained in the management of the estates long after the decease of Mr Tharp. Subsequently to Mr Tharp's death, the dealings with the house of Simond & Co. were carried on upon the same footing as they had been during his lifetime. The accounts rendered by Simond & Co. were entitled in this way, "On the risk and account of the estate of the

late J. Tharp, Esq." Mr Green, besides, had separate transactions with the house, in which he was debited in the ordinary way, being personally charged as a debtor to Simond & Co.

This was the mode in which the business continued to be conducted. Supplies were furnished till the year 1811, and the accounts were made up to the month of December in that year; the shipments of provisions and lumber being entered on the one side of the account, and the consignments of rum on the other. At that period the war broke out between this country and the United States of America, and a considerable balance on the foot of this account was then due to Simond & Co. About the year 1816 or 1817 this suit was instituted to recover that balance, and praying that the debt, when ascertained, might be paid out of the proceeds of the consignments, or, what amounted to the same thing, out of the funds in court.

When the cause came on, a reference was directed to the Master to make two inquiries: first, whether the estate was liable in respect of shipments of lumber and provisions, where no credit had been given for them in the accounts between Mr Green and the estates; and secondly, whether the estate was so liable, where such credit had been taken. The Master has found, that the estate is liable in both respects,—in respect both of the lumber and provisions for which credit had been taken, and of those for which credit had not been taken, in the accounts between Mr Green and the trustees. To this report the defendant has excepted generally, and the exception comes on with the further directions. The main question, however, is on the exception; and it appears to me that this turns entirely on the nature of the contract, and of the credit given between the parties. In the first instance, the agreement was, that the lumber and provisions should be supplied by the house at New York, and that the shipments should be paid for by the rum—the produce of the specific estates. After Mr Tharp's death, the transactions were carried on upon the same footing. Mr Green was not personally debited, but the consignments were made on the account and at the risk of the estates: the accounts were headed in the same way; they were "Louis Simond & Co. in account with the estates of John Tharp, Esq.;" and all the circumstances lead me to believe that it never was intended that a personal credit should be given to Green or the other trustees; but that they and all parties looked to the estates; and that it was a credit given to them in respect of the estates. It appears to me, therefore, that the conclusion at which the Master has arrived was perfectly correct, and that no distinction can be made in this respect between the one account and the other; for, whatever settlement was made between Mr Green and the trustees, or Mr Green and the estates, that cannot affect the rights of Simond & Co., who were not parties or privy to any such settlement.

Upon these grounds, I am of opinion with the Master, that the estate was liable to pay the balance due, and that the trustees are consequently bound to pay it out of the proceeds in their hands, or, what comes to the same thing, out of the money now in court. The exception, must, therefore, be overruled.

Thomas *v.* Montgomery.

Russell and Mylne, 729.

Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the court in administering his assets will not be induced by that circumstance to direct an appropriation of the fund in court to answer pecuniary legacies, subject to such demands as creditors may eventually establish.

If in a suit to administer a testator's assets, it clearly appears that a surplus will remain after discharging all his debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the court will by anticipation direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors.

Principles on which such anticipated payments are to be applied in reduction of the claims of the legatees.

December 1829. January, August 5, 1830.

THE late duke of Queensberry died in the month of December 1810, possessed of a very large personal estate, which consisted principally of money in the public funds. By his will he bequeathed pecuniary legacies and annuities to a great number of persons, and he gave the residue of his estate and effects to be equally divided between two of the children of the present marchioness of Hertford. Shortly after his decease, a bill was filed by some of the pecuniary legatees against the executors, for the administration of his personal estate, and, in May 1811, a decree directing the usual accounts was pronounced in that suit.

Upon going into the Master's office it was discovered, that although the English debts of the testator, when compared with his assets, were extremely inconsiderable, and might be paid off without delay; yet in order to have the fund clear, so as to be distributable among the legatees, it would be necessary to await the result of certain legal proceedings then pending in the Scotch courts. These were proceedings instituted by persons interested as remainder-men in the entailed estates of the duke of Queensberry in Scotland, for the purpose of setting aside a great number of leases granted by the duke in contravention, as it was alleged, of his powers under the entail; and as the tenants who had purchased, and who held under the leases in question, would, in case of eviction, have claims for compensation to a large amount against the duke's personal estate, and, as the adjustment of those claims themselves could only be effected after a long course of litigation, it became obvious that the distribution of the assets among the legatees must be postponed to an indefinite and probably a remote period.

Under these circumstances, the particular legatees, in the month of June 1814, presented a petition to lord Eldon, wherein they submitted, that in consideration of the peculiarity of the case and the magnitude of the fund in court, the legacies and annuities ought to be set apart separately in stock, subject to the claims against the estate, so that the legatees might get their legacies and the interest due upon them, in stock at its then price, and have the benefit of further accumulations: they therefore prayed that so much of the fund in court as would be sufficient to answer the legacies, and interest, and arrears of annuities, might be set apart and apportioned

amongst the legatees and annuitants, subject nevertheless to the claims mentioned in the Master's report, as being then depending in Scotland.

Upon this petition, his lordship ordered that the Master should proceed upon the inquiries directed by the previous orders, and that the rest of the petition should stand over.

Various other proceedings were afterwards had in the cause. The suits upon which the extent and validity of the debts in Scotland depended, were brought to adjudication in the court of session, or by appeal in the house of lords, and were finally determined. The amount of the debts themselves were gradually ascertained, and many of them were paid off or abandoned. And as it became evident that the surplus, after satisfying all the remaining claims, supposing these to be established in full, would still be considerable, though their exact amount could not be known with certainty, payments on account were from time to time made to the particular legatees, without prejudice to the question of appropriation raised by their previous petition, until in the end, the whole of what remained due to them in respect of their legacies, both for principal and interest, was discharged. The general nature of the proceedings, and the mode in which the successive payments to the legatees were directed to be applied, are clearly stated in the judgment of the Lord Chancellor.

In the month of August 1829, the Master reported, that, after providing amply for all the contingent claims which were then outstanding, there would still remain in court an available balance of nearly 350,000*l.* three per cent bank annuities. The residuary legatees thereupon petitioned, that a portion of this balance might be transferred to them, leaving, however, a sufficient fund to satisfy the utmost possible amount of the unliquidated claims. The particular legatees at the same time presented a counter-petition, praying that such transfer might be stayed; that the question of appropriation which had stood over since June 1814, might be again taken into consideration; that the Master might ascertain the amount of the several legacies, and the arrears of the annuities as they from time to time accrued due, and might take an account of the dividends which from time to time accrued due on so much of the capital stock standing to the credit of the cause, as was applicable to pay and satisfy such legacies and arrears of annuities, and of the accumulations thereof, in such manner as if the same had been set apart and appropriated, and allowed to accumulate for their benefit; that the petitioners might, in addition to the principal of their legacies and interest at four per cent, and the arrears of the annuities, receive their respective proportions of the said interest, dividends and accumulations; that the sum reported to be a clear fund, after providing for the claims then unsettled, might be applied towards payment of what should be found due to the petitioners on such account, and that the deficiency, if any, should be made good out of the reserved fund, in the event of its proving more than sufficient to satisfy the outstanding demands, and that with that view, and subject to that charge, an appropriation and apportionment of the reserved fund might be made for the benefit of the particular legatees.

The two petitions were brought on together, when the question which they raised was elaborately argued before the Lord Chancellor.

Mr Pepys, Mr Bickersteth, Mr Rose, Mr Roupell and Mr Boteler, for the particular legatees, contended, at great length, in favour of the appropriation, on the ground of its expediency and justice; they also relied on certain expressions, which fell from lord Eldon, when the application was

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originally discussed before his lordship. The only case cited was The King *v.* Mainwaring(*a*), in the exchequer.

The Solicitor-General, Mr Horne, Mr Treslove, Mr Knight and Mr Lynch, for the residuary legatees, opposed the application.

August 5.—The Lord Chancellor. This is a question with respect to the appropriation of a fund under the will of the late duke of Queensberry. The testator died in the month of December 1810; and his English debts amounted to a very inconsiderable sum, to between 8000*l.* and 9000*l.* only. The legacies given by his will amounted to between 600,000*l.* and 700,000*l.*, and the funds, in personal property, as far as it is necessary to consider it, amounted to upwards of 1,300,000*l.* in the three per cents. If this had been the whole state of the personal property, of course the affairs of the estate might have been immediately wound up. But there were certain claims upon the fund, arising out of leases which the duke of Queensberry had granted of his Scotch estates,—claims for compensation preferred by the duke of Buccleuch and the earl of Wemyss, as well as by the tenants of the estates. The leases, it was supposed, had been granted in contravention of the powers of the duke of Queensberry; and until those claims were settled, the amount of the funds that would be eventually applicable to the payment of the particular legatees was, of course, uncertain.

In the month of June 1814, a petition was presented to the late Lord Chancellor, lord Eldon, on the part of the particular legatees, the prayer of which was, that an estimate might be taken of the sums that were at that time due to the particular legatees, for principal and interest; that an apportionment might be made of the funds, and that the sums then estimated to belong to the several particular legatees might be carried over to their separate accounts, subject always to the eventual liabilities arising out of the proceedings then depending in Scotland. When that petition came on to be heard, in the year 1814, lord Eldon refused, or rather declined, to make any order upon it; and the application was never renewed during the time his lordship was in office.

It was, however, suggested at the bar, and it appeared also from the papers, that when the application came on, the Lord Chancellor stated that he considered the claim to be just. Whether or not such an expression did fall from his lordship, I have now no means of ascertaining with accuracy. Some time afterwards, I think in the year 1817, in consequence of a reference to the Master, it was ascertained, that the amount of the Scotch claims I have adverted to would not exceed the sum of 565,573*l.* It was obvious, therefore, that there would be a very large surplus. This favourable situation of the funds encouraged the legatees to make a special application to lord Eldon; and the result of their application was a declaration of his lordship's opinion, that he might, with safety to all parties, and without endangering the Scotch claims, direct one-fourth of the amount of the legacies to be paid, calculating interest upon them up to that time; and an order was accordingly made to that effect.

Afterwards, in the year 1823, a report was made by the Master that, after satisfying the Scotch claims, in case they should be eventually established, there would still be a clear fund, amounting to between 400,000*l.* and 500,000*l.*, applicable to the claims of the legatees. In consequence of this report, an order was made for the division of that sum among the

(*a*) 2 Price, 67, and, under the name of Wall *v.* Attorney-General, 11 Price, 643.

legatees; and the distribution was directed to proceed upon this principle:—it was considered that the former payment should be applied, in the first instance, in satisfaction of the interest, as it existed at that time; that the surplus should be appropriated to the discharge of so much of the principal as it would satisfy; that interest should next be calculated upon the remainder of the principal; and that the sum which was now to be applied should be appropriated to the payment of the new interest accrued on the undischarged principal, and any surplus that might remain was then to be applied in liquidation of so much of the principal as that surplus would be equal to satisfy(*a*).

In April 1827, the Master, in like manner, again reported that there was a clear sum of 360,000*l.* applicable to the payment of the legatees. And an order was thereupon made by the Vice-Chancellor, in the month of June in that year, directing a second division of that fund to be carried into effect upon similar principles with the former.

In the month of January 1828, another report was made by the Master, stating that there was a clear fund of 226,000*l.* applicable to the payment of the balance due to the pecuniary legatees. The balance then due for principal and interest did not amount to that sum, and the court ordered so much of the fund to be distributed, according to the principles already explained, as would be equal to the discharge of the balance. The result, therefore, of the process has been this: as soon as the court ascertained that there was a surplus which might with perfect security be resorted to, that surplus was directed to be applied in discharge of the existing interest, and what remained, after the discharge of the existing interest, was applied in discharge of the principal; and in this way successive payments were made, whenever the court found it could be done with safety, until the whole of the legacies, with interest, were paid off and satisfied.

By the last report which the Master has made, it appears that there is in court a clear fund of 343,870*l.* bank annuities belonging to the estate of the testator. This fund is claimed by the residuary legatees. On the other hand, the particular legatees lay claim either to the whole, or to a part of it, according to the result of the calculation which they contend ought to be made. They maintain, that although no order was made on the petition of June 1814, the question was reserved by the subsequent orders; because, whenever the successive apportionments of the fund were authorized, these were expressly directed to be made without prejudice to the question of appropriation. The terms of the orders are not very precise in that respect; but still there is in most of them a reservation, that the payments shall be considered as being made without prejudice to any question existing in the cause. The particular legatees, therefore, contend that they are now entitled to agitate the same question as they intended to agitate by their petition of June 1814. And they say that their claim ought to be considered now as if the appropriations of the stock, taking it at the market price of the day, had been then actually made, and the amount carried over to their separate account, according to the prayer of their petition; that a calculation should be made of the accumulations thereupon, and the aggregate sum be computed upon that principle; that the estate should, on the other hand, have credit for the

(*a*) This mode of applying the payments made to the pecuniary legatees on account of their legacies was afterwards brought into discussion upon exceptions to the Master's report, when its propriety was confirmed by the judgment of the Vice-Chancellor. 2 Sim. 348.

payments they have received, and that they, the particular legatees, should be paid the balance; and the single question is, whether upon that ground they can have a right to any portion of this, the residuary fund.

Now, according to the ordinary practice in administering the assets of a deceased testator, the court, in the first place, waits until all the claims on the estate are settled, and until the clear fund is ascertained; and then the particular legatees are paid. They are paid their principal, and if entitled to interest, they are paid interest at the rate of four per cent up to that time.

In this particular instance, on account of the fund being so large with reference to the claims to which it was subject, the court anticipated the payment to the legatees; it allowed them from time to time to receive their interest whenever that could be paid with safety; and it also allowed them to receive, from time to time, so much of the principal as could be paid before the claims were finally settled and wound up. In fact, therefore, before the claims were finally settled and wound up, they have received the whole amount to which they would be entitled, according to the ordinary rules of the court. The question is, whether, in the peculiar circumstances of this case, the court will depart from its ordinary rules, for the purpose of granting them that which they pray by their present petition.

Lord Eldon refused to make any order upon their petition in 1814. He continued in office for twelve years afterwards, and no attempt was ever made to renew the application. It appears to me that the consequence of acceding to the application would be, that the court would establish a new principle, and one which, unless it was laid down as a universal rule, would be productive of this inconvenience and injustice;—it would be to give an election to a particular legatee. The particular legatee, if the public funds happened to be very low, would apply to have an appropriation; because in that case he would receive more than the interest which the court allows. If, for example, the three per cents were at 50*l.*, instead of receiving four per cent, he would by the effect of such an appropriation, receive six per cent upon his legacy. And he would also have the benefit of the chance of a rise in the funds. In that state of the public securities, therefore, he would naturally make an application. If, on the other hand, the funds were extremely high, as if the three per cents were between 90*l.* and 100*l.*, and it was likely that the affairs of the testator would be wound up within a moderate time, he would hold back, and allow matters to take their usual course, because it would be more beneficial, in that state of the funds, to take the interest according to the ordinary rules of the court, at four per cent. In the one case he would make an application to the court, because it would be beneficial to him and disadvantageous to the residuary legatee; in the other he would decline to make it, because it would be disadvantageous to him and for the benefit of the residuary legatee.

It appears to me, therefore, that to accede in a particular instance to the prayer of a petition like the present would be unjust; because it would be to give a right of election to a party who is not entitled to elect. It would be to give him an election to prefer his petition to the court, and to give him that benefit at the expense of the residuary legatee. The question, then, appears to resolve itself into this,—Ought we to establish that as a general rule? Is it a better rule than the one which the court has hitherto followed? I think it is not; for, according to the rule

which the court has adopted, the party ultimately receives the amount of his legacy, with interest at four per cent; and all contingencies are left to fall on the residuary legatee—contingencies disadvantageous to him in some cases, and favourable to him in others. The court, in establishing this as a general regulation for its guidance, has deemed it better to give a fixed sum to the pecuniary legatees, with a certain rate of interest, throwing all the contingencies on the residuary legatee, than to adopt the opposite course. That, in my opinion, is the best rule. I see no ground to deviate from it in the present instance. And the fund in dispute must, therefore, be considered as belonging to the residuary legatees.

Jeffray *v.* M'Cabe.

Russell and Mylne, 739.

IF the time for referring a further answer for insufficiency upon the old exceptions under the sixth order has expired, it cannot afterwards be revived by referring the answer for impertinence.

Semble, it is too late to except to an answer for impertinence, when the time has expired, after which, according to the new orders, the answer is to be deemed sufficient.

August 12, 18, 1830.

Osbourn *v.* Fallows.

Russell and Mylne, 741.

To a bill for the redemption of a mortgage term all the *cestuis que trust* interested in the produce of the term, as residuary legatees under the mortgagee's will, are necessary parties; although they are numerous and the property small, and although the trustees have power to give a discharge to purchasers.

August 13, 18, 1830.

THE plaintiff's grandfather having conveyed certain messuages of which he was seised in fee to one Cotterell for a long term of years, to secure the repayment of 100*l.* with interest, the term was afterwards assigned, in 1762, to Joseph Fallows, who at the same time made a further advance of 60*l.* on the security of the mortgage, and, under an arrangement with the mortgagor, was let into possession. The interest of Joseph Fallows in the term subsequently devolved upon his grandson John Fallows, who continued during his lifetime in possession of the premises, and died in the year 1803. By his will John Fallows gave, devised and bequeathed the mortgaged premises, together with all his other real and personal estate, to four trustees (two of whom he also named executors), their heirs, executors, administrators and assigns, upon trust, after payment of certain legacies, to sell and convert the same into money, according to their discretion, when his youngest son should attain twenty-one,

and to apply and distribute the produce among the testator's twelve children, and a grandchild *nominatim*, in manner therein mentioned, with benefit of survivorship and accruer, if any of them should die under age; and he directed the receipt of his trustees to be a sufficient discharge to purchasers. The bill was filed against the surviving trustees and the personal representatives of John Fallows, for a redemption of the mortgage.

At the hearing it was objected by the defendant's counsel, that the *cestuis que trust* under the will of John Fallows, and those claiming under them, were not made parties; and the Vice-Chancellor (sir J. Leach) having allowed the objection, and directed the cause to stand over, with liberty to the plaintiff within a month to amend his bill by adding parties, an appeal was brought from that order.

Mr Wray, for the plaintiff, submitted, that inasmuch as the trustees were competent to give discharges to purchasers, and had, by the will, the absolute dominion over the property, it was not necessary to make the *cestuis que trust* parties; their interests would be sufficiently protected by the trustees. There was no imperative rule which prevented the court from exercising a reasonable discretion on the subject; Yates *v.* Hambly, 2 Atk. 237, the principles of which were recently approved by the Lord Chancellor of Ireland, sir A. Hart, in Bifield *v.* Taylor, 1 Beattie, 91. The property here was so small, and the persons beneficially interested under the will were so numerous (for some of them had died leaving issue, after their shares had vested), that to insist upon bringing them all before the court would be tantamount to a denial of justice, as the costs would far exceed the value of the surplus.

Mr Treslove, contrà, relied upon Calverley *v.* Phelp, 6 Mad. 229(*a*); and he also contended, that an appeal against an order directing a cause to stand over for want of parties, with liberty to amend, could not be entertained. Such an order was always made by consent. The plaintiff ought to have let his bill be dismissed, and have thereupon appealed. Beresford *v.* Adair, 2 Cox, 156.

August 18.—The Lord Chancellor. I think there is not sufficient in this case to justify me in rescinding the order of the Vice-Chancellor. The case of Yates *v.* Hambly, 2 Atk. 237, does not, in my opinion, support the application. Lord Hardwicke said in that case, that "where a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties." In the present case there does not appear to have been any such intention. The testator directs the property to be sold, and the produce to be apportioned among his children, and one grandchild. They happen to be thirteen in number, but it does not appear to me that that is a sufficient ground for departing from the usual rule. And I consider it necessary in this case that the parties entitled under the will should be made defendants to the suit, as provided by the order of the Vice-Chancellor.

(*a*) See Adams *v.* St Leger, 1 Ba. & Be. 181.

Prebble *v.* Boghurst.

Russell and Mylne, 744.

UNDER an award in a cause, which award was afterwards made an order of court, the costs of certain parties were directed to be taxed and paid to them out of the fund: a part of those costs was incurred in proceedings upon a case sent to law; when the bills were carried in for taxation it was discovered that the person who had acted as their solicitor throughout the suit, and who had already been paid in full, was not a solicitor, but an attorney only; the Master thereupon disallowed all the items in the bills except disbursements to the clerk in court, and his taxation was confirmed on appeal.

August 6, 1830.

Coates *v.* Hawkyard.

Russell and Mylne, 746.

AFTER the plaintiffs' costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted as a solicitor; and an order was thereupon made, that the Master should review his taxation, and disallow all such items as did not consist of fees paid to the clerk in court, with a view to having them refunded.

Rolls.—July 28, 1831.

Sumner *v.* Ridgway.

Russell and Mylne, 748.

IT appearing, upon a reference to tax an agent's bill of costs in a chancery suit, that he never had been a solicitor of the court, the Master was directed to disallow all the items, except those for disbursements made to his clerk in court.

July 29, 1831.

Roberts *v.* Walker.

Russell and Mylne, 752.

Personal property, not belonging to a felon, convicted of simple larceny and sentenced to transportation, at the time of his conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown.

Where a testator creates a mixed and general fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies: and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir, and as far as it is composed of personal estate, to the next of kin.

Rolls.—July 27, August 2, 1830.

SARAH WHITE, by her will, dated the 31st of May 1822, gave various legacies, and devised a "copyhold tenement to Hannah Dean for her life, and subject to the bequests and devises thereinbefore contained, so far as the same extended," she gave and bequeathed unto Thomas Walker and Thomas Gould, their heirs, executors, administrators and assigns, certain freehold and copyhold messuages therein particularly described; "also all that her leasehold messuage or dwelling-house, with the appurtenances, situate in Canal street in Wolverhampton, &c.; also all her household goods, furniture, plate, linen, bedding and other household effects, eight shares in the British Fire Office, six shares in the Birmingham New Brass Company, ten shares in the Birmingham Mining Copper Company, ten shares in the Birmingham and Worcester Canal, stock of copper and brass, moneys out on mortgages, bonds, notes of hand and other securities, and the securities on which the same were invested, ready moneys, book debts, and all and singular other her real and personal estates whatsoever and wheresoever that she should die possessed of, interested in, or in any wise entitled to; and also all and singular the messuages, lands, tenements and hereditaments whatsoever, which at the time of her decease should be vested in her either in fee or during any life or lives, or for any term or number of years or otherwise, by way of mortgage, for securing any sum or sums of money, to hold the same messuages, lands, hereditaments, real and personal estates, and all other the premises thereinbefore mentioned (subject as therein aforesaid) unto and to the use of them the said Thomas Walker and Thomas Gould, their heirs, executors, administrators and assigns respectively, for, during, and to the full extent of her estate, right, title and interest therein and thereto, according to the nature, quantity and quality thereof respectively, upon trust, as soon as conveniently might be after her decease (and subject to the said devise for the life of the said Hannah Dean), to make sale and dispose of, either by public auction or private contract, and in such lots as to them or him should seem meet, all her freehold, copyhold and leasehold messuages, lands, seat or pew, hereditaments and premises, and all other her real estate, for such price or prices in money as they or he should deem sufficient; and also to sell, dispose of, collect, get in and convert into money all and singular her said personal estate bequeathed to them as aforesaid, as soon as conveniently might be after her decease: and as to the moneys

arising from such sale and conversion of her said real and personal estates, and as to the rents and profits of her said real estates, until the same should be sold, upon trust, in the first place, to pay, satisfy and discharge all her just debts, funeral expenses, and all the costs, charges and expenses which her said trustees and executors should be put unto into in proving, fulfilling and carrying into execution the trusts and purposes of her said will, and in the next place, to pay the several legacies therein mentioned unto the several persons thereinafter named to whom she thereby bequeathed the same; all which said legacies" she directed should respectively be paid at or calculated from the expiration of twelve calendar months after her decease, or so soon afterwards as there should be funds applicable thereto, with lawful interest for any time which should elapse from the said expiration of twelve calendar months: and she directed that her said trustees, or the survivor of them, his executors, administrators and assigns, should, by and out of the said trust moneys, pay and apply such sum and sums of money as should be sufficient to pay all and every legacy duty and duties payable to government in respect of all the said several bequests payable out of the said trust moneys, so that the said legatees respectively might have and enjoy the same bequests entire and without any deduction or abatement whatsoever in respect of legacy duty: and she also directed that, in case any of her said legatees should be then dead, or should die in her lifetime, having left children or a child, such children or child should have and take the legacy thereby given to their, his or her parent or parents respectively, in equal proportions, if more than one: and as to all the residue of the said trust moneys, she directed her said trustees and the survivor, his executors, administrators or assigns, to pay and apply the same to and for the benefit of such person or persons, in such parts, shares and proportions, manner and form, at such time or times as she should, by any codicil or codicils to her said last will and testament, give and bequeath, direct or appoint, of and concerning the same, she not having then yet made up her mind in what manner she should dispose of such residue.

The testatrix died in July 1822, without having made any codicil, or any further disposition of her real or personal estate.

William Turton White was one of her next of kin living at the time of her decease. In March 1818, having been convicted of simple larceny at the Warwick assizes, he received sentence of transportation for fourteen years, but judgment of death was not recorded against him; and, in pursuance of his sentence, he had been sent to New South Wales, where he still was.

There were two questions in the cause:

I. Whether William Turton White's share of the personal effects of the testatrix was forfeited to the crown.

II. Whether the debts and legacies of the testatrix were to be satisfied out of her personalty, as far as it would extend, in exoneration of the real estate, and for the benefit of the heir; or, whether they were to be borne by the real and personal estates proportionally.

Mr Wray, for the crown, on the first point.

In Foxley's case, 5 Rep. 110, lord Coke says, "At common law the goods of a clerk, convict by verdict or confession, were forfeited to the king, not only all which he had at the time of the conviction, *but all the goods which he got afterwards, until he had made his purgation or*

gotten his pardon, &c. And in case when he could not make his purgation, or in case when he could make purgation, *till purgation made, he remained a person disabled to take goods to his own use;* and, therefore, question hath been made upon the statute of 18 Eliz. c. 7, by which it is enacted, that, after clergy allowed, and burning in the hand, the prisoner shall be presently enlarged and delivered out of prison: if one after the statute is convicted of felony, and has his clergy, and is burnt in the hand, and afterwards acquires goods, he shall forfeit his goods which he acquires after, till he obtains his pardon; for now he cannot make purgation, and peradventure the cause or offence was such, that he could not make purgation. And (Pasch. 41 Eliz.) this doubt was resolved; for in action on the case on trover, brought of certain goods by Hesdon, as administrator of Riddleson, against Masterson, the defendant pleaded, that before the trover, the intestate was convicted of felony, and burnt in the hand, and afterwards acquired the said goods, on which the plaintiff demurred in law; and it was adjudged for the plaintiff, forasmuch as the statute has taken away the ordinary means and power from him who might make purgation, which was the ordinary means to make him capable of goods to his own use; and as to him who cannot make his purgation, forasmuch as by the said act it was enacted, that he shall be presently enlarged and delivered, which is in lieu of a pardon by good construction, the same act has made him as capable in both cases to purchase goods to all purposes, as if he had made his purgation in the one case or obtained his pardon in the other." It is, therefore, clear that a person convicted of clergyable felony forfeited not only all the chattels which he had at the time of his conviction, but all such as he might acquire between conviction and the complete satisfaction of the law, either by his being burnt in the hand, or by his having obtained a pardon. The 4 Geo. 1. c. 11, and 6 Geo. 1. c. 23, substituted transportation for burning in the hand; and provided, that where an offender had served the term for which he was transported, such service should have the effect of a pardon; consequently, a person convicted of a clergyable felony and sentenced to transportation, continues incapable of acquiring property for his own benefit, until he has obtained a pardon or has completed the term of his transportation. Rex *v.* Burridge, 3 P. Wms, 462; Tombes *v.* Ethrington, 1 Levinz. 120; Blackstone's Commentaries, vol. iv. pp. 365—373. In Bullock *v.* Dodds, 2 Barn. & Ald. 258, it was held, that a person convicted of felony, upon whom judgment of death had been pronounced, but whose sentence had been commuted into transportation, was not restored to his civil rights till after the expiration of the term for which he had been ordered to be transported, and that all personal property accruing to him either before or after conviction became vested in the crown. The 5 Geo. 4. c. 94, s. 26, enables felons, who have received from the governor of the colony a remission of the whole or part of their term of transportation, to maintain actions; a provision which implies that, without such an enactment, they were not capable of acquiring any title to property.

Mr Tinney, contrà.

The dictum of lord Coke is not confirmed by any decided case; and no instance can be produced in which chattels, accruing after conviction to a person convicted of a clergyable felony, have been claimed or seized by the crown. In Bullock *v.* Dodds, judgment of death had been pronounced; the person was an attainted felon: and from the time of

attainder he was *civiliter mortuus* and altogether incapable of any civil rights. But the doctrine of attainder has no application to conviction for mere clergyable felonies; and that statute pardon, which is necessary in order to revive in an attainted person the capacity of having civil rights, is not needed, where no attainder has occurred to extinguish that capacity. The 19 Geo. 3. c. 74, s. 3, authorizes the court, instead of burning in the hand, to impose a moderate pecuniary fine on a person convicted of felony within the benefit of clergy: could any enactment be more ridiculous, if it was impossible for such a felon to have any property before the fine was paid? How was the fine to be paid, if all the property, to which he might have any title before payment, belonged to the crown?

On the second point Mr Tinney cited Ackroyd *v.* Smithson, 1 Bro. C. C. 503, as an authority which proved, that, where a testator formed one mixed fund of the produce of his real and personal estate for the payment of debts and legacies, and the disposition of the residue, by reason of lapse or otherwise, was not complete, the debts and legacies were not to be thrown in the first place or exclusively on that portion of the fund which arose from personalty, but were to be apportioned between the produce of the personal and the produce of the real estate in the ratio of their respective amounts. Such, he said, had for many years been the established course of the court in all cases of this kind. Attorney-General *v.* The Earl of Winchelsea, 3 Bro. C. C. 373(*a*).

Mr Wray, for the crown, was in the same interest.

Mr Pemberton and Mr Lynch, for the heir.

In Ackroyd *v.* Smithson no question was raised as to the apportionment of the debts and legacies between the two portions of the fund; and that case is, therefore, no authority upon the point. In the Attorney-General *v.* Winchelsea the debts and legacies were apportioned, not between the personal estate and the real estate, but between two classes of personal estate, namely, the general personal estate and moneys secured by mortgages; which two classes, though different parties were interested in them, were alike liable by law to bear the burthen of debts and legacies. In Paice *v.* The Archbishop of Canterbury, 14 Ves. 364, the testatrix gave all her real and personal estates in trust for the "following purposes:" these purposes were for the payment of debts and legacies, and then for charitable uses. One question discussed was, whether the money produced by the sale of the leaseholds and freeholds was liable to any part of the debts, legacies and costs; and it was held that the freehold estate was not to be burthened with any part of the debts or legacies, or of the general costs of the suit. That is a conclusion which follows from the settled doctrine of the court, that the personal estate is not exempted from the payment of those charges which it is primarily liable to bear, unless by plain words or necessary inference; and that inference is not furnished by a devise of real and personal estate, subject to debts and legacies, or upon trust to sell and pay debts and legacies, unless upon the whole will there be a manifest intention to exonerate the personalty. In the will of the present testatrix there are neither express words declaring that the personal estate, as far as it may extend, is not to bear the whole burthen of debts and legacies, nor any clause from which an inference can be drawn that such was

(*a*) The decree in the Attorney-General *v.* Winchelsea, is given in Seton's Forms of Decrees in Equity, page 130.

the intention of the testatrix. The principle on which the decree was made in Paice *v.* The Archbishop of Canterbury, was followed in Crosbie *v.* The Mayor of Liverpool, decided at the rolls on the 8th of February 1821 : and so much of a residue given to charity as consisted of money produced by the sale of freeholds, was ordered to be paid over to the representatives of the heir, without contributing towards the payment of any of the testator's debts or legacies. In Chitty *v.* Parker, 4 Bro. C. C. 411, a testatrix directed all her property, real and personal, to be sold and turned into money, "which I give and devise as follows :" she then ordered her debts to be paid, and gave several legacies, some of which lapsed. The personal estate being more than sufficient for the payment of the debts and legacies, the question in the cause between the next of kin and the heir at law was, whether any part of the real estate ought to be sold. According to the doctrine contended for here by the next of kin, the debts and legacies ought to have been borne by the personal estate and the real estate *pro ratâ*. But lord Thurlow was of a contrary opinion, and held that the heir at law was entitled to the whole of the real estate, and that the next of kin had no right to call for a sale. In Hill *v.* Cock, 1 Ves. & B. 173, a testator, after some specific devises and bequests, gave and devised all other his freeholds and leaseholds, together with all his personal estate, upon trust to sell the same, and out of the moneys thence arising to pay certain costs and charges ; and by a codicil he gave some legacies, which he directed to be paid out of his real and personal estate : by the decree the personal estate was directed to be first applied in payment of the debts and legacies. In Smith *v.* Claxton, 4 Madd. 484, the proceeds of the real and personal estate were formed into a mixed fund for the payment of debts and legacies ; yet the debts and legacies were paid out of the personal estate exclusively. That circumstance is adverted to in the judgment ; "the debts and legacies," says the Vice-Chancellor, "are fully paid out of the personal estate, 4 Madd. 493, and no intimation is given that a different course of administration ought to have been followed. In Howse *v.* Chapman, 4 Ves. 542, a testator directed a share in the Bath Navigation and various descriptions of personal property to be sold, and the proceeds of the sale to be applied in paying his debts and legacies ; and he gave the residue to a charitable purpose. The decree at the hearing, 4 Ves. 542, declared that the Navigation share descended to the heir at law; and by the decree on further directions the personal estate exclusively was applied in payment of the testator's debts and legacies. Inchiquin *v.* French, 1 Cox, 1, is an authority to the same effect. Southouse *v.* Bate, 2 Ves. & B. 396. From all these authorities the conclusion is, that the real estate, or the produce of the real estate, ought not to contribute to payment of debts and legacies, unless the personalty shall prove insufficient.

Mr Tinney, in reply.

In Inchiquin *v.* French the question was, whether the real estate was charged with debts and legacies, so as to exonerate the personalty ; and the court was of opinion that the personalty was not exonerated, and that the real estate was charged only as a subsidiary fund. Chitty *v.* Parker may have proceeded on a similar principle ; but it is probable that the question of apportionment was not there brought under the consideration of the court ; for the question argued was, whether the real estate was to be considered as so completely converted into personalty that the next of kin were entitled to claim it against the heir. In Hill *v.* Cock the debts

and legacies were first charged on specific property; and the general mass of real estate was charged only as a subsidiary fund. Such cases have no application, where the testator constitutes one mixed fund, composed partly of realty and partly of personalty, and throws on the whole certain common charges. It was some time before it was settled in the administration of charities, that where debts and legacies, some of which were to charity, were given out of a fund consisting of the proceeds partly of freeholds, partly of leaseholds and partly of personal chattels, the burthen ought to be apportioned according to the value of the three funds respectively. That principle was not followed in the decree in Paice *v.* The Archbishop of Canterbury and the other cases of charity which have been referred to.

The question is simply, what was the intention of the testatrix? She has directed her real and personal estate to be sold, and, after payment of her debts and legacies, has expressed her purpose to dispose of the residue by a codicil. She never made a codicil; and it is only the residue of this mixed fund which is not disposed of. How can the heir claim the whole of the produce of the real estate, when a residuary legatee, appointed by the codicil, would have taken it, subject to a proportional share of the debts and legacies? The proceeds of the real and personal estate being once blended into a common mass, out of which the debts and legacies are to be paid, how can it be argued that the testatrix intended that the debts and legacies were to be a charge, not on the whole of the fund thus constituted, but merely on a portion of it, arising from a single source?

August 2.—The Master of the Rolls. In this case two questions are made; first, whether personal property, not belonging to a felon sentenced to transportation at the time of his conviction, but which accrued due to him afterwards, during the term of his transportation, is forfeited to the crown? And, secondly, where a testator directs his real and personal estate to be converted into money, and the mixed fund to be applied to certain stated purposes, and some of those purposes fail by lapse or otherwise, whether the remaining purposes, which are in their nature primary charges upon the personal estate, are to be satisfied out of the personal estate, as far as the same will extend, in exoneration of the real estate, for the benefit of the heir, or whether the remaining purposes are to be satisfied out of the real and personal estate *pro ratâ?*

The first point appears to be settled by the case of Bullock *v.* Dodds, 2 Barn. & Ald. 258; and a felon, until the term of his transportation has expired, is not restored to his civil rights.

With respect to the second point, it does not appear that the attention of the court has been distinctly called to it in any of the numerous cases in which the facts would have raised the question, and there would be great difficulty to reconcile the different decrees which have been made upon this point. The question is of great importance by reason of its frequent recurrence, and is to be carefully considered. It is a question of intention; and it must be admitted, that, in order to throw upon the real estate any part of the burthen to which the personal estate is primarily liable, the intention of the testator must be manifest. When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates, which have been converted into that fund, shall answer the stated purposes and every

of them *pro ratâ* according to their respective values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those purposes, is undisposed of. As far as this part of the fund has been composed of real estate, the heir is to have the benefit of it as so much real estate undisposed of; and as far as this part of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the benefit of the next of kin; and in order to ascertain the proportions which will thus belong to the heir and next of kin respectively, it must be referred to the Master to compute the respective values of the real and personal estate, which are thus blended by the testator into one common fund.

The decree contained, among other directions, the following: "His honour doth declare the crown entitled to the share of William Turton White of and in the personal estate of the testatrix;—and it is ordered, that the Master do apportion the legacies (except the charitable legacies), funeral expenses and debts of the testatrix, and also the costs of this suit up to and including his further report, between the testatrix's real and personal estate, in proportion to their respective values; for which purpose he is to set a value on the real estate and on the outstanding personal estate (if any), and reserve the consideration how the proportion to be borne by the real estates, and any and what interest thereon are to be raised; and it is ordered that the rents of the real estates be received by the heiress at law *ex parte materna;* and his honour doth declare the heir at law *ex parte materna* entitled to the undisposed surplus of the freehold and copyhold estates, and doth declare that the freehold and copyhold estates are liable to a rateable proportion, with the personal estate, of the sums charged by the testatrix on the mixed fund."

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1, The statutes of a college directing that the president on his election should be admitted, and prescribing an oath to be taken by him and some other ceremonies to be performed, held, upon evidence of a particular form of admission besides the oath and ceremonies mentioned in the statutes having been used, and upon the ground that in such offices the admission is generally a distinct act, that the admission did not consist in taking the oath, and going through the ceremonies mentioned in the statutes, but in the observance of that particular form. *Case of Queen's College, Cambridge*, 1

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10, Where possession of property of a certain amount is required as a qualification for the office of president of a college, it is not necessary for a candidate to produce his qualification at the election. *Ibid.*

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13, In college statutes making the possession of property a disqualification, real estate alone is in general considered. *Ibid.*

14, When real property is required as a qualification by college statutes, the modern doctrines of equity are not to be too rigidly applied in determining what is real; and, therefore, an interest in land which in a court of equity would be deemed personal estate may satisfy the statute. *Ibid.*

15, The effect of the act of uniformity in the case of a party neglecting to subscribe, is to render his office void without a judicial sentence. *Ibid.*

16, *Semble.* The fellows of a college being required to elect a president within a certain time after a vacancy, if the elected president neglects to subscribe the declaration of conformity before his admission, his office is *ipso facto* void, and a new election must take place within the specified time. *Ibid.*

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In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant, or by legal evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief: and where the quantity of the land of the plaintiff, in the possession of

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Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over, unless there were a failure of issue of all the devisees, there the devisees take cross remainders. Where estates tail are given to two persons only as tenants in common, there cross remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally or respectively. *Livesey* v. *Harding*, 589

CUSTOMARY TENEMENT.

Where a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. *Bingham* v. *Woodgate*, 314

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1, In a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the master reported that no debts had been proved; and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained and carried to his separate account. In 1825, a foreign prince claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in court; and the plaintiff, coming of age soon after, applied to have that sum paid out: Held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in court, to that proportion which the plaintiff's share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff. *Greig* v. *Somerville*, 453

2, Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time; and the executors refusing to interfere, the plaintiff, a residuary legatee, insisted on setting up the objection of the statute: Held, that it was competent for the plaintiff, or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executors. Whether the master is himself bound to take the objection. *Quære.* *Shewen* v. *Vanderhorst*, 459

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1, The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing, he can show a good title, although he had not such title at the time of the contract: but the defendant might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, and was not bound to wait till the plaintiff could acquire a good title. *Hoggart* v. *Scott*, 432

2, Under a decree for sale, made in a suit for the administration of a testator's assets, A. became, in 1813, the purchaser of certain lots, and, after a long resistance to the title, was in 1824 compelled to pay the purchase-money into court, and was let into possession: two years afterwards, and before the conveyances were executed, having discovered, by means of the information of third parties, a circumstance which constituted a material defect in the title, and which, there was reason to believe, had been long before known to the solicitor of the plaintiff, he obtained a reference back to the master; the master reported against the title; to the

DECREE.

report exceptions were taken, and before the exceptions came on to be heard, the vendors had cured the defect: Held, that the purchaser had a right to be discharged from his contract, and that a further reference of title ought not to be directed: that, in a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit. *Dalby* v. *Pullen*, 435

3, Under a decree directing the sale of an estate, which, as against T., one of the defendants, was only a decree *nisi*, and before the decree was made absolute, the estate was sold, and A. was reported the purchaser; afterwards, on the application of A., an order was made by the vice-chancellor discharging him from the purchase, on the ground that the decree was not absolute as against T.; the plaintiff immediately gave notice of a motion before the lord chancellor to discharge that order, and, that motion having stood over a considerable time, the decree was made absolute as against T., before it was heard: Held, that the purchaser was entitled to be discharged at the time when the application was made, and that he, having been once discharged by an order which was right at the time when it was pronounced, the contract could not be revived by the proceedings subsequently taken by the vendor to make the decree perfect. *Coster* v. *Turnor*, 441

DEMURRER.

Demurrer allowed to a bill stating in the alternative a title at law or in equity. *Edwards* v. *Edwards*, 158

DEPOSITIONS.

Practice.

DISCLAIMER.

In order to get rid of the effect of a disclaimer, a distinct application, supported by affidavits establishing a special case, is necessary. *Sidden* v. *Lediard*, 345

DISMISSAL OF BILL.

Practice.

DOWER.

1, An attendant term having become vested in the wife of the owner of the inheritance as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for a specific performance of the agreement, pending which suit the husband dies: Held, that the widow was not entitled to dower, that she was bound to assign the term to the purchaser, and that he was bound to accept the title. *Mole* v. *Smith*, 230

2, Husband and wife being defendants to a bill praying an assignment of a term, which the wife by answer claims to hold to preserve her title to dower, on the death of the husband the suit may proceed without a supplemental bill. *Semble*. *Ibid.*

ELECTION.

1, *Tibbitts* v. *Tibbitts*, 148

2, Testator gives his real and personal estate to his wife in trust for the equal benefit of herself and her children. She is bound to elect between her dower and the provision made for her by the will. *Dickson* v. *Robinson*, 236

3, Parties, having a right to elect between two titles, under one of which they were tenants for life, and under the other tenants in fee simple, continuing in possession for forty-three years, and executing deeds reciting that they held under the former title, their heir at law precluded from claiming the fee under the latter. *Dillon* v. *Parker*, 237

ELECTION.

4, A testator having directed his executors to sell whatever real estates he might die possessed of, and having given benefits to his heir at law, afterwards acquires other lands. The heir is not bound to elect. *Back* v. *Kett*, 255

5, An heir is not put to his election between a Scotch estate and benefits given to him by a will, by the force of mere general expressions: especially if the uses of the will are not applicable to Scotch property. *Johnson* v. *Telford*, 409

6, An heir is not to be disinherited by ambiguous expressions. *Ibid.*

7, A testator, by a codicil, reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon the trusts expressed in his will, and directed that, if any hereditaments purchased by him at any time or times should happen to be conveyed after the date and publishing thereof, his heir-at-law, or other real representatives, and every other person in whom the same should be vested, should, forthwith, upon his decease, convey and assure the same to his trustees upon the trusts of his will: he purchased other estates afterwards: Held, that, as to the subsequently purchased estates, a case of election was not raised against the heir taking benefits under the will. *Ibid.*

8, A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will: and therefore the heir, taking benefits under the will, must elect. *Churchman* v. *Ireland*, 412

9, Where judgment had been given at law, that a power of sale had not been well executed, the defendants at law, claiming under the alleged execution of the power, filed a bill in equity to have the defect in the execution of the power supplied, and the instrument by which it had been executed rectified; and they at the same time prosecuted a writ of error on the judgment: the suit in equity having been brought to a hearing, Held, that the plaintiffs in equity were bound to elect either to have the bill dismissed, or to abandon the writ of error. *Cockerell* v. *Cholmeley*, 494

EQUITABLE ASSIGNMENT.

In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund. *Watson* v. *The Duke of Wellington*, 573

EVIDENCE.

1, A testator gives to some persons annuities of £— long annuities, and to several others legacies of £— long annuities, on one of which he directs interest to be paid at 5*l.* per cent. Evidence of the amount of his property admissible to explain the latter bequests, and his property being insufficient to pay them in long annuities, held that sums of money to be raised out of his long annuities were intended. *Colpoys* v. *Colpoys*, 240

2, The probate act-book of the prerogative court, containing an entry of a will being proved, and of probate being granted to the executors therein named, admitted as evidence of those persons being the executors, without accounting for the non-production of the probate. *Cox* v. *Allingham*, 242

EXCEPTIONS.

Practice.

EXECUTOR.

1, It is the duty of executors, as far as possible, to preserve articles specifically bequeathed according to the testator's wish, and unless compelled, they ought not to apply them to the payment of debts. *Clarke* v. *The Earl of Ormonde*, 47

2, If a suit be commenced for administration of the estate, it is the duty of the executors, by putting in their answer speedily, to facilitate the obtaining a decree, under which the estate may be protected from actions. *Ibid.*

3, To an action by a creditor, the executor pleaded *non assumpsit*, a set-off, and *plene*

EXECUTOR.

administravit præter, and the verdict was against him on all these pleas. A decree for administration of the estate having been pronounced pending the action, an injunction was granted against the creditor on payment of his costs at law. *Lord* v. *Wormleighton*, 67

4, On a bill by an executor to recover a fund belonging to the testator, it appearing that the testators' debts were paid, and that the fund was bequeathed to infants, the court refused to have it transferred to the executor, but secured it in court for the benefit of the infants. *Orrok* v. *Binney*, 247

5, An executor, who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate. *Davis* v. *Spurling*, 325

EXONERATION.

Assets.

FORFEITURE.

1, A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends by bankruptcy, insolvency or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the lords' act (1 Geo. 4. c. 119), in the usual way; and some years afterwards the testator died: Held, that this insolvency operated as a forfeiture of the life-interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 467

2, Though, in cases of non-payment of money, the court will relieve against penalty or forfeiture; yet, when it is not a question of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, the privilege is lost, if the money be not paid accordingly. *Davis* v. *Thomas*, 533

3, Personal property, not belonging to a felon, convicted of simple larceny and sentenced to transportation, at the time of his conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown. *Roberts* v. *Walker*, 644

4, Where a testator creates a mixed and general fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies: and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir, and as far as it is composed of personal estate, to the next of kin. *Ibid.*

FRAUD.

1, A suit to set aside a settlement as fraudulent against creditors, entertained, where the plaintiff subsequently became a creditor by the breach of a covenant previously entered into by the settler. *Richardson* v. *Smallwood*, 262

2, Where a deed is set aside as fraudulent against creditors, the property becomes assets, and subsequent creditors are let in. *Ibid.*

3, In order to make void a deed as fraudulent against creditors, it is not necessary to

FRAUD.

prove that the party was insolvent at the time, if it appear that the intention was to delay creditors. *Ibid.*

FRIENDLY SOCIETY.

The court has no jurisdiction on petition in the case of a friendly society, where they have ceased to act on the rules allowed and filed pursuant to the statute. *Ex parte Norrish*, 75

GRAMMAR SCHOOL.

Devise to the dean and canons of Christ Church in trust to constitute and support a grammar-school at P., to appoint a master and usher, and pay them certain salaries, and the dean and canons to direct the management of the school. Held, 1, That the school was to be a free grammar-school for teaching the learned languages: 2, That the proper objects were the children of the resident inhabitants of P.: 3, That they must be the children of protestants, and must be educated according to the principles of the Church of England: 4, That the master might take boarders and day-scholars: 5, That the number of free-scholars was to be limited, and in fixing the number the court was guided by the amount of salary originally provided. 6, That the free-scholars were to be nominated by the trustees: 7, That the trustees were to visit the school at their discretion, and to be allowed their reasonable expenses: 8, An augmentation of the salaries of the master and usher made by the trustees, upon an increase of the income of the charity, not allowed to them, the school, through error, not having been devoted to the proper objects. But these augmentations were allowed by the lord chancellor on appeal. *The Attorney-General* v. *The Dean and Canons of Christ Church*, 220

GUARDIAN.

Parent and Child.

HABEAS CORPUS.

Jurisdiction. Parent and Child. Practice.

HEIR.

Election.

ILLEGITIMATE CHILDREN.

Wherever the general description of children in a will would include legitimate children, it cannot also be extended to illegitimate children. A testator devised a leasehold in trust for his "grandchild, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal shares; Elizabeth was illegitimate, and William had no other child: Held, that Elizabeth did not take any share of the residue. *Bagley* v. *Mollard*, 563

IMPERTINENCE.

Practice.

INFANT.

1, After a decree in one of two suits commenced in the name of an infant, it is not usual to refer it to the master to inquire which suit is most beneficial. *Taylor* v. *Oldham*, 249

2, But under the circumstances, the next friend in the suit in which a decree had been made was removed, and the next friend in the other suit substituted for him. *Ibid.*

INFANT.

3, An estate descending to an infant heir, subject to a lien or equitable charge: Held, that the parol does not demur in a suit instituted by other creditors. *Brookfield* v. *Bradley*, 297

4, Infants being added as parties to a cause after the report had been made, it was referred to the master to inquire, whether it would be for their benefit that the report should be adopted as to them. *Ibid.*

5, An estate descended to an infant heir cannot be sold at the suit of creditors, on the ground that, from the circumstances of the property, a sale will be beneficial to the infant. *Ibid.*

6, An estate descending to an infant heir, subject to a trust to sell for payment of certain incumbrances: Held, that it could not be resorted to for the payment of other specialty debts during the minority of the heir. *Ibid.*

7, Dividends, to which infants were entitled, ordered, without a reference, to be paid to their father for their maintenance; the parties being poor, and the property of small amount. *Payne* v. *Low*, 397

8, Order made upon petition, that part of a small sum of stock bequeathed to an infant, should be sold, and the proceeds applied in paying a debt incurred for necessaries on his account, and that the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance. *Ex parte Swift, in the Matter of Swift*, 562

9, Order made upon petition, that executors should be at liberty to apply certain small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, education and advancement, though the shares did not vest till the children came of age. *Ex parte Chambers, in the Matter of Chambers*, 563

INJUNCTION.

1, Piracy.

2, Injunction refused, the affidavit of the plaintiff's title not being positive. *Hill* v. *Reardon*, 39

3, Injunction, in a case of account dissolved so far as it extended to stay trial, where the defendant being of unsound mind, the answer was put in by a guardian unable to give a full discovery. *Barrett* v. *Tickell*, 70

4, A defendant of unsound mind answering by a guardian unable to give a full discovery, on a motion to dissolve an injunction, affidavits cannot be read by the plaintiff to prove facts that might be given in evidence at law. *Ibid.*

5, Exception to the rule against reading affidavits in support of the common injunction, extends only to documents of which the defendant is ignorant, not to facts and circumstances. *Ibid.*

6, Plaintiff, in a bill to restrain the setting up of outstanding terms, cannot bring an ejectment before the hearing without the leave of the court. *Beer* v. *Ward*. *Ward* v. *Beer*, 91

7, Injunction to restrain the setting up of terms not obtained on motion. *Ibid.*

8, Special injunction to restrain proceedings in ejectment between two defendants refused where the plaintiff as landlord might have made himself defendant at law. *Moses* v. *Lewis*, 236

9, After a decree for the administration of a testator's estate in England and Ireland, an incumbrancer upon the Irish estate having come in and proved his debt, restrained from proceeding in a creditor's suit, instituted by him in the court of chancery in Ireland, receiving the costs up to the time of his having notice of the decree, and paying the costs of the application. *Beauchamp* v. *The Marquis of Huntley*. *Clarke* v. *The Earl of Ormonde*, 259

10, The contents of documents set forth in the schedule to the answer, in an injunction cause, may be obtained before the dissolution of the injunction, and used to oppose the motion to dissolve it. Hence, when the injunction has been dissolved, and

INJUNCTION.

the plaintiff afterwards, by inspecting the documents referred to by the answer, discovers new matter, he cannot move to revive the injunction upon an amended bill containing the new matter, and verified by affidavit. *Powell* v *Lassalette*, 260

11, In a suit to set aside *post-obit* securities, an injunction being granted, the principal and interest will be ordered into court, and will not be payed to the defendant. *Marsack* v. *Farlow*, 268

12, A railway company, in exercise of the powers conferred on them by an act of parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch over a mill-race, for the purpose of sustaining an embankment on which the railway was to be constructed; and it appeared that injury would be done to the mill, if the arch were of the proposed dimensions, but that the injury would be avoided, if the arch were of certain larger dimensions; an injunction was granted to restrain the company from making over the mill-race an arch of less than certain specified dimensions. *Coats* v. *The Clarence Railway Company*, 378

13, An injunction allowed to be moved for ex parte, in a pressing case, after the defendants had entered an appearance. In this case counsel having been instructed to oppose the motion, although no notice had been given, the court allowed them to be heard. *Acraman* v. *Bristol Dock Company*, 447

14, Where the plaintiff has by tortious means got into possession of property, pending a suit to establish his equitable title to it, the court will not stay legal proceedings against him for the recovery of possession. *Grafton* v. *Griffin*, 452

INTEREST.

1, A purchase being set aside for fraud, and the purchaser decreed to pay an occupation rent, receiving back his purchase-money with interest, there being a considerable excess of the rent above the interest, annual rests directed to be made in the accounts, until the excess of the rent should liquidate the principal. *Donovan* v. *Fricker*, 77

2, Rests not necessarily directed in accounts against mortgagees. *Ibid.*

INTERPLEADER.

1, It is no objection to an interpleading bill that a suit between the same parties commenced by one of the claimants of the fund is pending. *Warington* v. *Wheatstone*, 95

2, The injunction on an interpleading bill stays all proceedings. *Ibid.*

3, In an interpleading suit, the injunction may be moved for before the time for answering has expired. *Ibid.*

INTERROGATORIES.

Practice.

IRISH CURRENCY.

A testator, by his will made in Ireland, prior to the 6 Geo. 4. c. 79, bequeaths an annuity, and dies domiciled in England, after that act was passed. The annuity is to be paid according to the rate of Irish currency. *Holmes* v. *Holmes*, 603

ISSUE.

1, New trial of an issue granted, the verdict being unsatisfactory from the circumstances under which the jury returned it. *The East India Company* v. *Bazett and others*, 42

2, Both parties ordered to be examined upon the trial of an issue, directed upon a motion for an injunction, supported by the plaintiff's affidavit, and opposed upon the affidavit of the defendant contradicting it. An order directing an issue, not to be

ISSUE.

appealed from after the trial has taken place. *Semble.* *De Tastet* v. *Bordenave*, 243

JURISDICTION.

1, *Semble*, Notwithstanding a decision of the commissioners appointed by the stat. 59 G. 3. c. 31, and the conventions for liquidating the claims of British subjects on the French government, or of the privy council on appeal, in favour of a claimant, his right may be disputed, and he may be declared a trustee of the sum awarded to him for other persons, showing themselves to be entitled. *Hill* v. *Reardon*, 39

2, Demurrer allowed to a bill praying that a pretended will might be delivered up to be cancelled, and an injunction and a receiver, till letters of administration should be granted; the pendency of a suit in the ecclesiastical court not being distinctly alleged, and the court of chancery not having jurisdiction to try the validity of the will. Several causes of demurrer may be assigned. *Jones* v. *Frost*, 217

3, A court of equity relieves against a defective execution of a power only when the defect consists in the want of some circumstance in the manner of execution; and it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law. In order to work confirmation, the party said to confirm must know the law as well as the fact. Lands were devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property, or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and in the meantime to invest it in the public funds, and, for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.*, exclusive of the timber, which was to be taken at a valuation; and, it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed, by which he, in consideration of 2448*l.*, conveyed the timber to the purchaser, and the trustee, in consideration of 13,400*l.*, conveyed the land exclusive of the timber. Many years afterwards, the tenant for life being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much three per cent stock as 2448*l.* would have produced at the time of the sale. After the death of A., the next remainder-man, though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment, on the ground that the power of sale was not well executed: Held, that a court of equity could not relieve against that judgment. *Cockerell* v. *Cholmeley*, 494

LEASE.

Power. Practice.

LEGACY.

1, Will.

2, Equal sums given to the same person by a will and codicil, held, from the character and objects of the latter, to be substitutional and not accumulative, although the legacy given by the codicil was only conditional. *Fraser* v. *Byng*, 334

3, Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the court in administering his assets will not be induced by that circumstance to direct an appropriation of the fund in court to answer pecu-

LEGACY.
niary legacies, subject to such demands as creditors may eventually establish. *Thomas* v. *Montgomery*, 636
4, If in a suit to administer a testator's assets, it clearly appears that a surplus will remain after discharging all his debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the court will by anticipation direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors. *Ibid.*
5, Principles on which such anticipated payments are to be applied in reduction of the claims of the legatees. *Ibid.*

LENGTH OF TIME.
Statute of limitation.

LIEN.
Lien established against the produce of West India estates in respect of supplies furnished to the estates, upon an agreement implied from the course of dealing and conduct of the parties. *Simond* v. *Hibbert*, 632

LIFE INTEREST.
1, Costs.
2, Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust* during his life, his interest passes to his assignees under the insolvent act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund. *Green* v. *Spicer*, 483
3, Where a sum of money is bequeathed in terms that give an absolute interest to the legatee, the mere addition by subsequent words of a power to dispose of the legacy by will during the continuance of a prior life-interest in the money, does not by implication exclude the right of the legatee to dispose of it by deed *inter vivos* during the same period. *Comber* v. *Graham*, 510

LIMITATIONS, STATUTE OF.
1, A trust for the payment of debts in a will of personal estate will prevent the operation of the statute of limitations. *Jones* v. *Scott*, 413
2, Notice in a newspaper by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the statute of limitations. *Semble. Ibid.*
3, But *semble*, a debt is not taken out of the statute of limitations by an advertisement published by the administrator, requesting all persons, having claims on the estate, to send in statements of their demand, prior to their being laid before A. B., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient. *Ibid.*

LIS PENDENS.
Notice.

LUNATIC.
1, Injunction.
2, The committee of a lunatic ought to be resident within the jurisdiction of the court, and, therefore, an allowance made him for expenses in visiting the lunatic, discontinued on his going to live in Scotland. *Ex parte Ord, in the matter of Shields, a Lunatic*, 44
3, Return to a commission of lunacy, that the party is a lunatic, enjoying lucid inter-

LUNATIC.

vals, and that during such intervals he is competent to the government of himself and his affairs, quashed, and a new commission issued. *Ex parte Atkinson, in the matter of Parkinson*, 157

4, No jurisdiction in lunacy, after the death of the lunatic, to try the question of heirship; but in a case of disputed heirship, the possession was, under the circumstances, given to the parties reported by the master to be the heirs at law. *Ex parte Clarke, in the matter of the Dowager Duchess of Norfolk, a Lunatic*, 276

5, A party claiming to be heir to the lunatic permitted, after the possession of the estates had been given up to the parties reported to be the heirs, to inspect deeds and documents remaining in the master's office, which, it seems, may be retained till a proper investigation has taken place. *Ibid.*

6, The statute 39 and 40 Geo. 3. (lord Eldon's act) does not apply to money paid into court in the matter of a lunatic. *Ex parte Verney*, 301

7, The property of a lunatic only to be invested in government securities, except under peculiar circumstances. *Ex parte Ellice*, 302

8, A committee of the person and estate appointed without a reference, where the property was small. *Ex parte Farrow, in re Adams*, 347

9, A committee should have the previous sanction of the court for not passing his accounts annually. *Anon.* 347

10, An abatement in the rent paid by the tenant of a lunatic's estate directed without a reference, under the circumstances, on the application of the committee. *In re Fitch*, 462

11, See also *In re Avery*, 463

12, Order granted on the committee of the person and estate of a lunatic, to deposit the lunatic's will, which had come into his hands many years ago, in the custody of the master, to whom the matter was referred, or with such other person as the court should think proper; on an affidavit of the facts that the will was in the same state in which the party received it, &c. *In re Thompson*, 462

13, A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest, amounting to 1600*l.* a year, towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account; and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces: Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her. *In re Ashley*, 471

MORTGAGE.

1, A mortgagee of a West India estate not taking possession, will not be appointed consignee by the court, unless the mortgage-deed contains a covenant for that purpose. *Cox* v. *Champneys*, 269

2, Mortgage by client to attorney for costs due and to become due, held, a valid security for the costs then due only. *Williams* v. *Piggott*, 281

3, A mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor: Held, that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate. *Greenwood* v. *Taylor*, 381

4, An insolvent mortgagor, even where his assignees disclaim all interest in the equity of redemption, ought not to be made a party to a suit for foreclosing the mortgage. *Collins* v. *Shirley*, 592

MULTIFARIOUSNESS.

1, A bill for an account of a testator's estate, and also to set aside sales made by the

MULTIFARIOUSNESS.

executor and trustee, to himself and to another person, held to be multifarious. *Salvidge* v. *Hyde*, 68

2, Bill by vendor for a specific performance, and praying against third persons claiming an interest in the estate, that they may join in the conveyance to the purchaser, multifarious. *Mole* v. *Smith*, 230

NE EXEAT REGNO.

Writ of *ne exeat regno* granted upon motion made without notice, after the appearance of the defendant. *Elliot* v. *Sinclair*, 258

NOTICE.

In a creditor's suit, the debts and costs were paid by the sale of one of two devised estates, and the court directed the master to settle the proportion which was to be borne by the other devised estate: the devisee of the first mentioned devised estate was entitled for life only; and, he being an ignorant person and a day labourer, no proceedings were had under this direction for twenty-six years, at the end of which time the other devised estate was sold. The year following the tenant for life died, and his son, who was entitled in remainder, filed a bill to charge the purchaser of the other devised estate with the proportion which it ought to have contributed towards the debts and costs; and a decree was made by the master of the rolls accordingly, upon the ground of *lis pendens*, which was held to amount to equitable notice of the charge. On appeal the decree was reversed by the lord chancellor, on the ground that there was no *lis pendens* at the time of the purchase. *Kinsman* v. *Kinsman*, 581

PARENT AND CHILD.

1, Jurisdiction of the court of chancery to control the authority of a father over his infant children. *Lyons* v. *Blenkin*, 115

2, Application of a father, praying that his children might be delivered up to him by an aunt, who was guardian of their fortunes, with a discretionary trust for their maintenance, and with whom he had permitted them to reside for a long time, refused under the circumstances. *Ibid.*

3, Motion to stay a suit commenced in the name of infants for accounts of their property, upon affidavits, representing that the suit was not for their benefit, refused. *Ibid.*

4, A sum of money being left to an infant, with a direction that her education should be committed to the trustees, and a legacy to the father, on condition of his not interfering in it, the condition enforced, by requiring his undertaking not to interfere. *Colston* v. *Morris*, 121

5, Jurisdiction to control parental authority on account of the pecuniary interest of the child. *Lyons* v. *Blenkin*, 125

6, Order for the father of wards of the court to be at liberty to take them abroad. *Ibid.*

7, A father's authority over his children controlled on the ground of his professing and acting on irreligious and immoral principles. *Shelley* v. *Westbrooke*, 126

8, The mother of natural children being alive, another person appointed guardian, with directions for intercourse between the infants and their mother. *Courtois* v. *Vincent*, 127

9, A settlement being made on an infant (whose father was dead) on condition of her being under the care of the settlor, it was referred to the master, to consider whether he should be appointed guardian, taking the settlement into consideration. *Fagnani* v. *Selwyn*, 127

10, Where a father has deserted his children, and is not of ability to maintain them, the court will make an order, referring it to the master to approve of a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infants that a certain sum should be raised out of the property to which they

PARENT AND CHILD.

are absolutely entitled under a will; and upon the master's report that it is for their benefit, and with the consent of the executors of that will, the court will order the sum to be raised accordingly. *In the Matter of the Estate of Mary England, deceased*, 530

PARTNERSHIP.

1, On the death of one partner, the survivor, retaining his capital and employing it in the trade, decreed to account for the profits derived from it, making him proper allowances for the management of the business. *Brown* v. *De Tastet*, 133

2, A., B., and C. being partners together, A. agrees with D. to give him a moiety of his share in the concern; an account may be decreed between A. and D. without making B. and C. parties. *Ibid.*

3, An order inconsistent with the original decree cannot be made upon exceptions to the report. *Ibid.*

4, Partnership amongst a number of persons, to be managed by a committee of five, and by general meetings, at which the vote of the majority was to be binding; with a provision, that any one wishing to retire should first offer his share to the committee at a certain price, and if they declined to buy, might sell it to any other person: Held, that the majority were not able to sell the whole concern without the consent of all; but that where all but two were desirous of retiring, they might sell their own shares without making an offer of them to the committee. *Chapple* v. *Cadell*, 254

5, Sale of a testator's share in a partnership trade, and the property belonging to it, by his executors, to his partners, for the purpose of being resold to one of his executors, set aside, and his estate held entitled to his aliquot proportion of the subsequent profits, as if the partnership had continued. *Cook* v. *Collingridge*, 286

6, Interest allowed at 5*l.* per cent on sums paid out of his estate. *Ibid.*

7, Articles of partnership, providing that, upon its expiration, the stock in trade should be divided, received, and taken by the partners, according to their respective interests: Held, that they could not be carried into execution literally, and that, therefore, by the general law of partnership, the settlement must be by a sale and division of the whole. *Ibid.*

8, Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 317

9, A person employed on behalf of himself and his copartners in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. *Fawcett* v. *Whitehouse*, 357

10, Before the transaction was discovered, one of the partners withdrew; and subsequently another partner assigned a share in the stock and in his proportion of this claim to persons then admitted into the concern: Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Ibid.*

11, Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner. *Pritchard* v. *Draper*, 383

12, One of the two partners, after the dissolution of the partnership, received the rents of a debtor to the partnership, and retained out of them the amount of the debt; and he stated, that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these moneys; but no account had been settled between him and the

PARTNERSHIP.

debtor: Held, that, as against the other partner, the debt to the partnership was not to be considered as satisfied. *Ibid.*

13, Residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, though collusion between the executor and surviving partner is neither charged nor proved. *Bowsher* v. *Watkins*, 424

14, A bill, filed by a creditor of a testator against the executor, and certain persons who were in partnership with the executor, alleged that the partnership claimed to be entitled to retain assets which were in their hands, in satisfaction of a debt which they pretended was due to them from the testator; but it did not charge in express terms that the executor was colluding with his co-partners: the creditor was held to have, under such circumstances, a right to sue all the partners; and a demurrer by the partners, other than the executor, was overruled. *Gedge* v. *Traill*, 426

PARTIES.

1, A bill against several defendants being retained, with liberty for the plaintiff to bring an action against one of the defendants, the trial may take place during an abatement occasioned by the death of one of the other defendants, if the decree does not direct them to attend it. On the death of a defendant, against whom the bill seeks to set aside a contract entered into by him for the sale of his wife's estate, it is regular to revive against his personal representative, without making his wife a party. *Humphreys* v. *Hollis*, 33

2, To a bill founded on a contract, the parties to the contract are, in general, the only necessary parties. *Ibid.*

3, *Quære.* A husband agrees to sell his wife's estate and dies. Whether the wife can enforce the contract against the purchaser. *Ibid.*

4, If one of two persons named trustees and executors disclaims and renounces, and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dove* v. *Everard*, 402

5, Persons having prior incumbrances on freeholds and copyholds, of which a trader, who died intestate, was seised at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estates. *Parker* v. *Fuller*, 601

6, To a bill for a commission to ascertain boundaries, all persons having any interest in the property, are necessary parties. *Rayley* v. *Best*, 603

7, To a bill for the redemption of a mortgage term all the *cestuis que trust* interested in the produce of the term, as residuary legatees under the mortgagee's will, are necessary parties; although they are numerous and the property small, and although the trustees have power to give a discharge to purchasers. *Osbourn* v. *Fallows*, 641

PERSONAL REPRESENTATIVES.

The words "personal representatives" are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will. *Saberton* v. *Skeels*, 566

PIRACY.

1, A plaintiff who complains of a piracy of his work, has no remedy in equity, unless he establish a title to an injunction; and then the account will follow. The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter, which is the subject of the alleged piracy, forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years. *Baily* v. *Taylor*, 329

PIRACY.

2, Equitable jurisdiction upon the 34 Geo. 3. c. 23, is not excluded by the special remedy thereby provided. Independent of that remedy, the statute vests in the inventor a right of property which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established. In this case the evidence as to title not being conclusive, the injunction was dissolved, and an issue directed, the defendants keeping an account. The court will, itself, compare and decide upon alleged piracies by inspection, where that can be easily and safely done. *Sheriff* v. *Coates*, 368

3, Injunction granted generally to restrain the sale, both before and after the term limited by the patent, of machines piratically manufactured while the patent was in force. *Crossley* v. *Beverley*, 372

PLEA AND PLEADING.

1, Plea by a trustee of a settled account and release, to inquiries as to the execution of a trust, held bad, for want of averments that the matters inquired after would appear from the account. Plea of a settled account and release to a bill by cestui que trust against trustee, will not extend to the discovery of vouchers. *Clarke* v. *The Earl of Ormonde*, 47

2, False plea put in for delay, ordered to be taken off the file with costs, to be paid by the solicitor. *Aubrey* v. *Aspinall*, 205

3, To a bill by one who claimed estates, either as heir *ex parte maternâ* of G., the person last seised, or as a remainder-man under the limitations of some prior settlement, charging that G. had only a life interest in the property, as would appear if the contents of a certain deed executed in 1730, and within the power of the defendant, were set forth, and praying, besides discovery in aid of ejectment, the removal of outstanding terms, and other relief connected with the action at law; a plea, that in 1766, G. being then tenant in tail in possession, duly suffered a recovery of the estates in question to the use of himself in fee, and subsequently devised them to the defendant, but taking no notice of the deed of 1730, and not stating any part of its contents, was overruled. *Hungate* v. *Gascoigne*, 620

4, A plaintiff, claiming as heiress at law of L., who had devised real estates to various persons in tail, reserving the ultimate reversion to his own right heirs, alleged by her bill, that the several estates tail had determined by failure of issue,—that no valid recovery had been suffered, or if it had, that the property had been so settled that she was entitled as right heir of L.,—and that so it would appear, if the defendant would produce the deeds creating the tenant to the *præcipe*, and leading or declaring the uses of such recovery: a plea, which set forth the substance of the deeds making the tenant to the *præcipe*, and leading the uses of the recovery (under which uses the plaintiff had no title), and of the recovery, was held to be a good defence, though not supported by any answer. *Plunkett* v. *Cavendish*, 628

POWER.

1, Articles for a settlement, with a power of leasing for 21 years, and other usual powers, &c. do not authorize the introduction of a power of granting building leases for longer terms. *Pearse* v. *Baron*, 72

2, *Quære.* Power of sale to be exercised with consent of three trustees, their heirs or assigns, and the trustees or the survivor, his executors or administrators, to give receipts. A new trustee is appointed in the place of one who retires; another trustee dies. Whether the power can be exercised with the consent of the continuing and the new trustee. *Hall* v. *Dewes*, 88

3, Devisees in trust, having the legal estate, with a power of leasing in possession, until the *cestuis que trust* attained twenty-one; leases not conformable to the power held void in equity, and not confirmed by acceptance of rent. *Bowes* v. *East London Water Works Company*, 152

POWER.

4, A will, directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, to and for the tenants for life, to be exercised by them when qualified, and when not, by the trustees, does not authorize the insertion of a power of sale and exchange. *Horne* v. *Barton*, 202

5, A feme covert having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death to trustees, upon trust, to invest the fund in the immediate purchase of an annuity for her life. The court ordered a transfer of the fund to the new trustees accordingly. *Lynn* v. *Ashton*, 382

6, If an act of parliament, by general words, purports to confer a power upon several donees, one of whom possesses the same power more amply at common law as incident to his estate, the statute shall not be intended to apply to him, so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorized, will be referred to his common-law right. *Ex parte Clayton*, 469

7, In a partnership deed it was stipulated, that the testator's interest in the partnership concern after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint, and in default of appointment, that it should devolve to his wife; in case of her death, to his children in equal shares; and in case of the death of all his children, to his executors or administrators: Held, that the true construction of this, is not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will. *Ponton* v. *Dunn*, 486

8, The testator made a will, not containing any allusion to the power, by which he gave all his estate and effects to one of his children: Held, that his interest in the partnership passed by this bequest. *Ibid.*

9, Learning as to what powers of appointment are capable of being extinguished or released. *West* v. *Berney*, 501

10, A fund being limited to a father for life, with remainder to his children in such shares as he should appoint, and in default of appointment, to the children equally, the father released the power as to a portion of the fund so as to vest a share of it in himself as executor of a deceased son, who, in default of appointment, took a vested interest; the court refused to order the transfer of this share to the father. *Cunynghame* v. *Thurlow*, 501

11, *Semble*. Where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levies a fine, the power will be extinguished. By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of four hundred years, to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son and one or more younger child or children, who should live to attain his, her or their age or ages of twenty-one years, to raise such sum, not exceeding 200*l.* in the whole, as the husband and wife should by any deed or writing appoint, or in default thereof, as the survivor should by deed or writing, or his or her last will or testament appoint; and in default of such appointment, or subject thereto, after the moneys so appointed should have been raised, and the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, and afterwards the husband levied a fine of the premises: Held, that the power was extinguished by the fine. *Bickley* v. *Guest*, 505

12, A testator devised lands to trustees upon trust, out of the rents and profits to pay

POWER.

two annuities, and subject thereto to permit A., and after him his wife, to receive and take the rents and profits during their respective lives; and, after the decease of the survivor, he devised the lands to their children: Held, that the trustees could grant a valid lease of the lands for a term of ten years. *Naylor* v. *Arnitt*, 531

13, Although a will does not state that it is made in execution of a power, yet if it plainly refer to and comprise the subject of the power, it will be deemed a good execution. Construction of clauses in a settlement and will relative to allowances for the maintenance of younger children. *Hunloke* v. *Gell*, 533

PRACTICE.

1, Under a decree to account, made upon taking the bill *pro confesso*, against a defendant who has appeared but has not answered, he cannot attend the master without the leave of the court, but leave to attend given, and the sequestration discharged upon payment of the costs of the contempt, and of the suit. *Heyn* v. *Heyn*, 25

2, When after depositions have been suppressed for irregularity, a re-examination is permitted, all the same witnesses must be examined and cross-examined. *Perry* v. *Silvester*, 38

3, Leave given upon petition, to the purchaser of the interest of a party to attend the master in making inquiries directed by the decree. *Toosey* v. *Burchell*, 73

4, Petitions in the matter of a person found an idiot must be served on the attorney-general. *Ex parte Watson*, 75

5, On a cause standing over for want of parties, the plaintiff is in general to pay the costs of the day, although the objection be not noticed in the answer. *Semble*. *Hill* v. *Kirwan*, 76

6, Persons residing out of the jurisdiction not to be appointed guardians by the court. *Logan* v. *Fairlee*, 90

7, The messenger having defendant in custody under an attachment, and having afterwards let him go at large upon his undertaking to pay the costs, cannot use the process to compel payment. *Jenkins* v. *Sandys*, 109

8, Leave to file a supplemental bill in the nature of a bill of review, to introduce new evidence, refused, where the proper means of searching for it had not been used previously to the decree. *Bingham* v. *Dawson*, 114

9, Permission to exhibit an interrogatory as to the loss of a deed omitted to be proved by mistake, given to the plaintiff at the hearing, under the circumstances. *Cox* v. *Allingham*, 159

10, A document which is stated in the bill, and which the answer admits and refers to, cannot be read from the bill at the hearing, but must be produced. *Ibid.*

11, A bill may be taken off the file, if filed in the name of a plaintiff who is in a state of mental incapacity. *Semble*. *Wartnaby* v. *Wartnaby*, 173

12, A suit being properly instituted, the proceedings not to be stayed on the ground of the plaintiff's subsequently becoming imbecile. *Ibid.*

13, Irregularity of subpœna to hear judgment waived by appearing on a motion to advance the cause, and not then taking the objection. *Cawick* v. *Young*, 248

14, On a reference to the master to inquire whether proceedings at law and in equity are for the same matter, all proceedings are in general stayed in the mean time. *Amory* v. *Brodrick*, 251

15, But where the plaintiff having, before the order was drawn up, proceeded at law, the defendant had applied to the court of law and obtained time upon terms, it was held, that he had waived the benefit of the order, and was bound by the intermediate proceedings. *Ibid.*

16, A plaintiff cannot obtain leave to examine a co-plaintiff as a witness on giving security for costs. *Benson* v. *Chester*, 270

17, A fund paid out to persons entitled to it subject to the contingency of a female of

PRACTICE.

advanced age having children, on their recognizance to refund in case of that event happening. *Leng* v. *Hodges*, 274

18, After an answer has been reported insufficient, an order to amend, and for the defendant to answer amendments and exceptions together, prevents the defendant from taking exceptions to the report, if it be served before the exceptions are set down. *Farquharson* v. *Balfour*, 275

19, Interrogatories and depositions not to be referred on motion of course before the hearing for impertinence alone, without scandal. *Osmond* v. *Tindall*, 295

20, Exceptions to an answer must be signed by counsel. *Yates* v. *Hardy*, 301

21, Exceptions not signed by counsel, taken off the file, though the defendant had taken an office copy of them, and the plaintiff had obtained an order of reference. *Ibid.*

22, Order, empowering the master from time to time to receive proposals for leases, and to report on them. *M'Dermot* v. *Kealy*, 303

23, A fund carried to a separate account paid out on motion by consent, the title to it being clear. *Heathcote* v. *Edwards*, 303

24, A second order to amend, obtained by petition of course, is irregular, though obtained before answer. The acceptance of the 20*s.* costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order to amend, obtained as of course. *Tarleton* v. *Dyer*, 304

25, If a defendant, who is in a situation to dismiss a bill by an order of course for want of prosecution, after replication filed, does not avail himself of his right, but permits the plaintiff to file interrogatories and examine witnesses, he cannot afterwards dismiss the bill for want of prosecution; and an order of dismissal, subsequently obtained, will be discharged for irregularity. *Fernes* v. *Hutchinson*, 309

26, The sixtieth of the new orders extends to the production of books and papers under orders or decrees made before the date of the new orders. The master is to exercise the discretion given him by the sixtieth order, to determine what books or papers shall be produced, though the order or decree, under which he is proceeding, requires the parties to produce, on oath, *all* books and papers. *In the matter of several Parishes of Llantrisant, &c.* 310

27, Statements in an answer are impertinent, if they are neither called for by the bill nor material to the defence, with reference to the order or decree which may be made on the bill. Statements in an answer to a bill of revivor, which merely show irregularity and misconduct in the former proceedings in the suit, are impertinent. Form of exceptions for impertinence under the new orders. An exception for impertinence fails, if any part of the passage included in it be not impertinent. *Wagstaff* v. *Bryan*, 312

28, Under the eighteenth of the new orders, publication may be enlarged on affidavit, without notice. *Brown* v. *Brown*, 332

29, Formal amendments will be permitted to be made, without notice, though the bill has been amended previously. *Smith* v. *Evans*, 332

30, In general, under the thirteenth order, a motion for leave to amend a bill which has been previously amended, must be made on notice. *Freme* v. *Best*, 332

31, A second order, giving the plaintiff leave to amend, made upon an ex parte application. *Cottingham* v. *Potts*, 332

32, In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer that he had not delivered a signed bill conformably to the act of parliament: a bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill: *Semble*, the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured: But held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions. *Pritchard* v. *Draper*, 383

33, The plaintiff filed his original bill, and the defendant got into contempt for want of an answer. The answer was ready, but before it was filed, the plaintiff amended

PRACTICE.

his bill, so that the clerk in court could not receive the answer to the original bill; and it being considered that the plaintiff had by his own act purged the defendant's contempt, the defendant moved at the rolls that he might be discharged. The practice being considered new, the motion was made next day at Westminster, before lord Eldon, when his lordship, after consideration, granted it. The clerk in court issued a certificate of the bill being amended. *Ball* v. *Etches*, 448

34, On the allowance of exceptions to the answer, leave given ex parte to the plaintiff to amend his bill, although it had been previously amended. *Mendizabel* v. *Hullett*, 449

35, The thirteenth of the new orders does not apply to amendments made upon exceptions to the answer being submitted to or allowed: nor does it apply to amendments made before any answer is put in: but in all cases to which it does apply, notice is necessary as well as an affidavit, unless the court upon the particular circumstances dispenses with it. *Bird* v. *Hustler*, 449

36, An accountant who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 449

37, Where an order directing money to be paid out of court is appealed, the accountant-general is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings to the court below. *Ferguson* v. *Tadman*, 449

38, Where the plaintiff's solicitor, merely through ignorance or mistake, has neglected to comply with the exigency of the seventeenth order, the court will not relieve the plaintiff, upon terms, from the penal consequences of the neglect, without the consent of the other party. *Walmsley* v. *Froude*, 451

39, A party permitted to intervene as a defendant in a cause after it had been heard on further directions, he having been out of the jurisdiction during the previous proceedings, and now submitting to be bound by them. *White* v. *Hall*, 451

40, Ordered on motion, and also an affidavit of service of the notice of motion, that an issue which the master of the rolls had, in the year 1827, directed to be tried in Middlesex, and in which the defendant in equity was to be the plaintiff, should be taken *pro confesso*, on an affidavit of the facts,—that the plaintiff in the interval had repeatedly made default, and had declined going to trial. *Powell* v. *Wood*, 461

41, An order was made that the defendant should pay a sum of money by a certain day, or on default, should stand committed. The plaintiff having been unable to serve that order in time, the defendant keeping out of the way, obtained, as of course, a second order to enlarge the time allowed for the payment, and make service of it on the defendant's clerk in court good service: The second order was irregular: it ought to have been made on notice. *Leake* v. *Nalder*, 463

42, In a suit for the specific performance of a contract for the sale of an estate in the West Indies, against a purchaser who resided there, and had got into possession without paying the purchase-money, and to which the consignees of the estate were also defendants, an application for a receiver of the proceeds of the consignments was refused, the principal defendant, the purchaser, having never been served with a subpœna. *Stratton* v. *Davidson*, 526

43, A caveat tendered at the proper office after a decree has been delivered to the secretary for enrolment, and forwarded to the lord chancellor in order to be signed, comes too late to prevent the effect of enrolment, although in point of fact the signature was not adhibited till after the caveat was tendered. The enrolment of a decree will not be vacated merely on the ground of despatch used by the party enrolling, or of surprise upon the opposite party, where no fraud or deception has been practised. A party is not bound to communicate to his adversary his intention to enrol the decree, because the latter informs him of his intention to appeal against it. *Barnes* v. *Wilson*, 527

PRACTICE.

44, An order to amend, obtained in violation of the thirteenth of the new orders, may be treated as a mere nullity; although, therefore, it remains undischarged, it is no answer to a motion to dismiss the bill. If notice of a motion to dismiss a bill for want of prosecution is given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made. *De Geneve* v. *Hannam*, 528

45, If a motion, after being refused with costs in the court below, be renewed upon new facts and evidence in the court of appeal, it may be granted with costs, it being substantially an original motion. *In the matter of Joseph and Webster*, 528

46, If the time for referring a further answer for insufficiency upon the old exceptions under the sixth order has expired, it cannot afterwards be revived by referring the answer for impertinence. *Semble*, it is too late to except to an answer for impertinence, when the time has expired, after which, according to the new orders, the answer is to be deemed sufficient. *Jeffray* v. *M'Cabe*, 641

RECEIVER.

1, Receiver of the debts due to a business, appointed at the suit of persons to whom a share of the profits had been assigned against a subsequent assignee of the debts. *Candler* v. *Candler*, 105

2, Where a receiver is in possession, other persons not permitted without the leave of the court to enter, under a claim of a right of common not previously exercised. *Johns* v. *Claughton*, 267

3, A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir at law. *Clark* v. *Dew*, 342

4, The court will not appoint a receiver of the annual allowance paid to the assistant parliamentary counsel to the lords of the treasury, before the hearing. Whether that allowance be assignable, *quære?* *Cooper* v. *Reilly*, 558

REVERSION.

A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age, and a bachelor, dying without issue, is not the subject of estimate or calculation. But the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the court, as between the vendor and purchaser, will value the contingency accordingly. *Baker* v. *Bent*, 397

SIX CLERKS.

The six clerks are not responsible for the correctness of the office copies. Their signature is affixed as a certificate that the original is filed. *Browne* v *Barnard*, 301

SOLICITOR.

1, *Semble*, Motion to restrain a solicitor from giving evidence of confidential matters, refused, the propriety of his being examined being left to the consideration of the court before which he might appear as a witness. *Beer* v. *Ward*, 35

2, A solicitor who has been discharged, may upon proof of misconduct be restrained from communicating information that came to him confidentially from his client. *Ibid.*

3, A clerk to a solicitor commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master. *Bricheno* v. *Thorp*, 141

SOLICITOR.

4, A party liable under a bond of indemnity for the costs of another, having, on a compromise, paid what the solicitor stated to be the amount of them, is entitled afterwards to have the bill taxed. *Balme* v. *Paver*, 144

5, It cannot be made one of the terms of the compromise of a suit that the solicitor's bill shall be paid without taxation. *Semble. Ibid.*

6, Held, that an attorney cannot take a mortgage from his client for securing future costs. *Jones* v. *Tripp*, 151

7, A solicitor discharged by his client or his representatives is not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not being paid. *Lord* v. *Wormleighton*, 271

8, Sums below 10*l.* payable out of court to a number of persons, paid to their solicitor, to save the expense of powers of attorney. *Brandling* v. *Humble*, 300

9, A solicitor, who purchases from his client, is bound to prove that he paid that price for the property, which, in the exercise of his professional duty, he would have advised his client to accept from a third person. After a delay of eighteen years, a bill filed by a client against his solicitor to avoid a purchase, was dismissed. *Champion* v. *Rigby*, 548

10, By the direction of A., a bill was filed for the administration of a testator's assets, in which A. and his infant brother and sister, by A. as their next friend, were plaintiffs; D., their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents: after the sister had attained her full age, D. died, having appointed her his executrix: A gave notice to the persons who had been the town agents of D., not to take any proceedings in his name, and the sister appointed them to act as solicitors for her: Held, that A. was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them. The sister filed a bill of revivor after the death of D., and made A. and his infant brother defendants: A. and the brother, after notice of that bill, filed another bill of revivor: this second bill was ordered to be taken off the file; and the court held, that an alleged defect of the parties in the frame of the first bill of revivor afforded no reason for allowing the second bill of revivor to remain on the file. *Livesey* v. *Livesey*, 304

SPECIFIC PERFORMANCE.

1, Decree. Multifariousness. Vendor and Purchaser.

2, Specific performance refused, on the ground of representations having been made at the sale on the part of the vendor, of improvements affecting the value of the premises intended by him, which were not carried into effect. *Beaumont* v. *Dukes*, 195

3, Bill to enforce contribution under an agreement by owners and occupiers of land in a parish, to defend and prosecute tithe suits at joint expense, dismissed upon doubtful evidence and long delay. *Stone* v. *Yea*, 197

4, A decree for a reference of title on a bill for a specific performance should contain a declaration that the contract ought to be specifically performed. *Mole* v. *Smith*, 230

5, A court of equity will not entertain a bill for the specific performance of an agreement to pay, in a certain event, which has happened, an annual sum by quarterly instalments. *Brough* v. *Oddy*, 321

6, It is no defence to a bill for specific performance by the vendor, that during the treaty he falsely assumed the character of agent for another, when, in fact, he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom the contract was made, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise. *Fellowes* v. *Lord Gwydyr and Page*, 332

7, Where an agreement expressly refers to a plan as an existing document, forming a

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term in the contract, parol evidence is admissible for the purpose of identifying the plan. But unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused. *Hodges* v. *Horsfall and others*, 349

8, If land, generally reputed to be water meadow, is sold by the assignees of a bankrupt by the description of uncommonly rich water meadow, whereas in fact it is very imperfectly watered, this is not such a misrepresentation as will avoid the sale. *Scott* v. *Hanson*, 355

9, The plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance till about a year afterwards: the bill was dismissed on the ground of unreasonable delay. *Watson* v. *Reid*, 404

10, Where a person having a clear title to 12*l.* for rent, and claiming the property of the land, is induced, by the representations of two professional persons that he had no right to either rent or land, to agree to accept 10*l.* in full, for rent and land, the court will not entertain a bill for the specific performance of the agreement. *Stanley* v. *Robinson*, 544

11, A defendant cannot avail himself of a matter in defence, which appears only upon his evidence, and was not stated in his answer. But if the plaintiff, upon his own case, is not entitled to the relief prayed, the court will not assist him. *Ibid.*

12, If the defendant himself writes the agreement for the purchase of a leasehold house, and states his own name in the third person as "Mr A. B. has agreed;" this is a good contract within the statute of frauds, though he does not otherwise sign the agreement. *Propert* v. *Parker*, 585

TIME, LENGTH OF.

Statute of limitations.

TITHES.

1, A bill for an account of tithes received from the occupiers, by a person claiming under an adverse legal title, will not lie. *The Bishop of St Asaph* v. *Williams*, 167

2, The tithe of calves is to be set out when they are fit to be weaned, and to live alone on the same food with the cow. *Bearblock* v. *Tyler*, 265

3, The proper mode of tithing hay is by the fork and rake. *Ibid.*

4, The rule, that involuntary rakings are not titheable, does not extend to hay. *Ibid.*

5, In a suit by an impropriate rector for tithes, when the defence is that the tithe in question is vicarial, and the vicar who is a defendant dies during the suit, it is not necessary to make the new vicar a party, if the plaintiff will waive the account subsequent to his induction. *Daws* v. *Benn*, 301

6, The tithe of tare seed held to be a small tithe. *Ibid.*

7, An usage of rendering one article of small tithe to the rector, will not support his title against the vicar, if it appears to have originated from a mistaken notion that the article in question was a great tithe. *Ibid.*

8, A modus of one penny, payable by every occupier of land in lieu of the tithe of hay: Held, bad. *Busk* v. *Lewis*, 302.

9, A modus of a shilling for a milch cow in lieu of the tithe of milk: Held, rank. *Ibid.*

10, Where tithes have never been paid since the dissolution, the court will presume all facts, which, consistently with the evidence in the cause, would give legal origin to an exemption from the payment of tithes. *Humphreys* v. *Wagstaff*, 545

TRUST.

1, Where the trust is too vague for the court to execute, the next of kin are entitled. *Fowler* v. *Garlike*, 403

2, A testatrix bequeaths the residue of her property to her executors, upon trust to dis-

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pose of the same at such times and for such purposes as they should think fit; it being her intention that the distribution thereof should be left entirely to their discretion: Held, that the executors were trustees of the residue of the property for the next of kin of the testatrix. *Ibid.*

3, If a trustee, to whom a legacy is bequeathed upon trust to purchase lands for charitable purposes, receives the money and lays it out in lands, which are conveyed to him upon the trusts expressed in the will, the trust thus executed is contrary to the mortmain act, and will not be carried into effect by the court. *Attorney-General* v. *Ackland*, 408

4, By a marriage settlement, stock was vested in trustees, upon trust, to pay the dividends to the husband during coverture, and to the wife during her life, in case she survived him; and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the said children as should attain twenty-one or be married, with a direction, in case all or any of such children should then be under twenty-one and unmarried, to apply the dividends for their maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the said children, in case there should be any, and all of them should die under age and unmarried, in trust for certain other persons: the wife survived the husband, and at her death there was no child of the marriage living; but a son, who died in her lifetime, had attained twenty-one, and married: Held, that the stock vested in that son absolutely. *Torres* v. *Franco*, 598

TRUSTEE.

1, *Semble.* Infant trustee for sale is not within the stat. 7 Ann. c. 19, though the persons entitled to the produce of the sale are adult and join in the petition. *Ex parte Chasteney*, 27

2, A contract improvidently entered into by a trustee will not be cancelled, but the court will not execute it. *Turner* v. *Harvey*, 79

3, Where personal property is bequeathed to the executors, as trustees, the probate of the will is an acceptance of the trusts. *Mucklow* v. *Fuller*, 93

4, The usual indemnity clause does not exonerate one of two trustees from a loss, occasioned by a debt due from the other, having been suffered to remain outstanding. *Ibid.*

5, If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees* v. *Nuttall*, 320

6, A trustee, refusing to pay a legacy without the direction of the court, in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight* v. *Martin*, 325

7, By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond: if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. *Cocker* v. *Quayle*, 547

USURY.

1, Deed by which A., B. and C., partners in trade, in consideration of 4000*l.* paid to them by D., in augmentation of their capital, agree to admit him into partnership

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with them for a term. It was agreed that D. should receive, in lieu of profits, a clear sum of 550*l.* per annum, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4000*l.* at the determination of the partnership. A., B. and C., were to pay rent, taxes, wages, and the other outgoings of the trade, which was to be carried on by them, and in their names only; and D. was not to be required to attend to it. D. was at liberty to retire on giving twelve months' notice; and on his retiring, or at the end of the term, the 4000*l.* and the arrears (if any) of the 550*l.* per annum, were to be paid to him by A., B. and C. by instalments, to be secured by their bonds, and they were to indemnify him from the debts of the partnership. Held that this deed was not usurious. *Fereday* v. *Hordern*, 65

2, Where an annuity is granted for a term of years, to be paid half yearly, and, at the same time, promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase-money with interest, exceeding the rate of 5*l.* per cent, the transaction is usurious. *Fereday* v. *Wightwick*, 318

VENDOR AND PURCHASER.

1, Relief given against a contract where the purchaser knew that the vendors, the assignees of a bankrupt, were ignorant of a circumstance considerably increasing the value. *Turner* v. *Harvey*, 79

2, The purchaser is not bound to give the vendor information as to the value of the property, but a very little is sufficient to affect the application of this principle. *Ibid.*

3, On a bill to set aside a purchase, the answer of the defendants, the devisees of the purchaser, admitting great inadequacy of price, and stating their ignorance as to other circumstances of fraud alleged, a receiver appointed. *Stilwell* v. *Wilkins*, 131

4, A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. No jurisdiction in equity to set aside a sale under an execution. *Semble.* *Stratford* v. *Twynam*, 193

5, Where the possession is vacant, a purchaser is not bound to inquire of the late occupier, what was the nature of his title. Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold, part of B.'s estate; A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale, as "late the residence of A.:" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation. *Miles* v. *Langley*, 314

6. Purchase for valuable consideration without notice is not available as a defence against a plaintiff who relies upon a legal title. *Collins* v. *Archer*, 428

7. A rector, in 1811, demised his rectory to A. for a term of years to secure the due payment of an annuity; in 1814, he, for valuable consideration, demised the tithes of certain lands within the rectory to the occupier B., who, at the time, had no notice of the prior charge: the annuity fell into arrear in 1816: and, in 1817, the rector took the benefit of the insolvent act: B. remained in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814; and no step was taken to enforce payment till 1827, when A. filed against him a bill for an account; in answer to which, B. insisted that he was a purchaser for valuable consideration without notice: Held, that the defence was of no avail against the legal title of the plaintiff; and that the defendant ought to account for the tithes for the six years before the filing of the bill. *Ibid.*

8, The written undertaking of one party will be enforced, although the other party is not mutually bound by writing. *Palmer* v. *Scott*, 481

VENDOR AND PURCHASER.

9, An exception to a report in favour of the title having been on argument allowed, leave was given to the plaintiff, some time afterwards, to go again before the master, for the purpose of bringing evidence to show that the objection which the court had sustained was, in the circumstances, immaterial. *Egerton* v. *Jones*, 619

10, Where the report is in favour of the title, the court, on allowing exceptions to it, will give the vendor a reasonable time within which to remove the objection, although the exceptions and further directions were set down to come on together. *Portman* v. *Mill*, 620

WASTE.

Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds. *Semble*. Usual injunction in cases of equitable waste not extended to trees which protect the premises from the effect of the sea. *Coffin* v. *Coffin*, 31

WILL.

1, Bequest out of real estate to erect a monument in a church to the testator's memory, is not within the statute of mortmain. Bequest to erect a monument to the testator's memory within a year after his death in the church of A., with a legacy to the rector of A., on condition of his consenting to the erection of the monument, and a direction, that if he refused, the testator was to be buried elsewhere. Held, that the purpose failed by the rector's refusing, for many years, to allow the monument to be erected, though a succeeding rector was willing to consent. *Mellick* v. *The President and Guardians of the Asylum*, 85

2, Testator gives the residue to be divided after his sister's death, amongst his nephews and nieces, and by a codicil gives to a great niece, whom he calls his niece, 500*l.* over and above her share after the decease of his sister, in the body of his will treated of more at large: held, that none of the great nephews or nieces were entitled to share in the residue. *Shelley* v. *Bryer*, 97

3, A recommendation by a testator to his son to continue his nephews in the occupation of their farms as heretofore, and so long as they continue to manage the same in a good and husband-like manner, and to duly pay their rents, is imperative. *Tibbits* v. *Tibbits*, 148

4, A testator leaving to his son and heir his real estates, and the residue of his personalty, with a recommendation to continue his nephews as tenants on an estate settled on the son, the latter decreed to elect either to continue them as tenants, or to make them a compensation for the value of the tenancy out of the property given him by the testator. *Ibid.*

5, Bequest to testator's daughter and her children, and in default of such issue, and in case of her death, to A. and B. The limitation over takes effect on her dying without children. *Gawler* v. *Cadby*, 163

6, Direction for payment of residue to E. G. H. to be applied by her, at her discretion, for or towards the education of her son, and that she should not be liable to account to him or any other person for the disposal or application of it. The residue being considerable: Held, that E. G. H. was entitled to it, subject to the application of so much as the court might think fit to the education of the son during his minority. *Hamley* v. *Gilbert*, 171

7, Bequest after the death of certain annuitants of a sum set apart by the court for payment of them, or of such part of it as should not, by reason of their deaths, have been assigned or transferred: Held, that a sum which had been ordered to be transferred on the death of an annuitant, but had not been actually transferred, did not pass. *Hooper* v. *Goodwin*, 172

8, Gift by will to A., to be paid to him at twenty-one, with a bequest over in the event of his dying under that age, or afterwards without heirs and intestate: Held, an absolute interest in A. on his attaining twenty-one. *Cuthburt* v. *Purrier*, 191

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9, Under an executory devise of a residue of real and personal estate, the intermediate rents and profits of the real estate pass, as well as the interest of the personalty. *Genery* v. *Fitzgerald*, 218

10, Gift to such of the children of A. B. C. as should be living at the testatrix's death, or the issue of such of them as should be married, in equal shares. The word *or* construed to mean *and*, and the children and grandchildren held to be equally entitled. *Horridge* v. *Ferguson*, 273

11, A testator bequeathed "to the two sons and the daughter of A. B. 50*l*. each:" at the date of the will and the death of the testator A. B. had one son and four daughters; each of these five children is entitled to a legacy of 50*l*. *Harrison* v. *Harrison*, 328

12, A testator by will gives his moiety of an estate called H. to his sister and her children, and subsequently by a codicil which purports to give them the whole of that estate if he shall possess it at his death, charges it with a sum of money to legatees: at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other: although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and equity will make no apportionment. *Lushington* v. *Sewell*, 374

13, A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age: Held, that the children of the sisters were not to take a vested interest, till they attained twenty-two: and, that all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote. *Vawdry* v. *Geddes*, 389

14, A testatrix having a son and two daughters, gave 6000*l*. three per cent stock to her son for life, remainder, as to one moiety of it, to his eldest male child living at her decease; and as to the other moiety, to his other children; she also gave 6000*l*. like stock to her daughters for their respective lives, in equal shares, remainder to their children; and she further gave a sum of bank stock to her three children in equal shares during their lives, and the share of each was, at his or her death, to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of these two stocks should be settled upon them for their lives, and afterwards upon their children: Held, that, by the operation of the codicil, the moiety of 6000*l*. three per cent stock, which, by the will, was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children; that, as to all the other bequests, the attempt to extend the limitations to great grandchildren was ineffectual; and that the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil. *Arnold* v. *Congreve*, 391

15, A testator gave a legacy of 12,500*l*. four per cent annuities. At the making of his will there was a stock called new four per cents, in which he had a small sum, and a stock called four per cents consolidated, of which he was a holder to a very large amount. Before the death of the testator, the latter stock was reduced to three and a half per cent; and another four per cent stock was created. The investment of the legacy is to be made in an existing four per cent stock, and not in the stock which had been reduced to three and a half per cent. *Banks* v. *Sladen*, 394

16, A testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7000*l*. bank stock,

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which, after the brother's death, was increased by a bonus to 8750*l.*: The testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7000*l.*: The court decreed that the 8750*l.* passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother. *Matthews* v. *Maude*, 484

17, That to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will. *Semble*. *Winterton* v. *Crawfurd*, 489

18, A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper: but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons: Held, that the sons were only joint tenants for life with a power of sale; that they could make a good title, and give discharges for the purchase-money; that they were joint tenants for life of the purchase-money; and that, upon the death of the survivor, it would devolve to their children. *Breedon* v. *Breedon*, 492

19, A testator, domiciled in Jamaica, gave legacies in Jamaica currency to J. C., H. C., and M. C., persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds which the will specified. At his death, which happened in Scotland in 17[illegible], no such bonds were to be found; but J. C. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, and which, a year after the testator's death, including interest, was equal to the amount of the penalties. In 1794, actions were brought in Jamaica upon those bonds, by the testator's personal representative there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy execution upon the judgments, and they remained unsatisfied. About the time of the testator's death the legatees came to England, and never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818, H. C. and M. C. assigned their respective legacies to the plaintiff, who was the personal representative of J. C., the other legatee; and he, in the year 1821, when administration was for the first time taken out to the testator's estate in England, filed the bill for the purpose of enforcing payment: Held, that the legacies were demonstrative only, and were not to be considered as having been ademeemed: that as they were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate, at the time of payment: that J. C. must be considered as having been paid his legacy by retaining the amount out of the bond debts, and that that amount was to be deducted, first from the interest, and then *pro tanto* from the principal due from him upon the bonds, as at the end of a year after the death of the testator; and interest was then to be calculated on the balance till the amount equalled the sum for which the judgments were recovered, and no further: that such retainer and set-off could not be allowed in respect of the legacies which the plaintiff claimed only as assignee; and, that the assigned legacies, under the circumstances, and after the lapse of twenty-seven years without demand, ought to be presumed to have been satisfied. *Campbell* v. *Graham*, 511

20, A bequest of a moiety of the interest of the residue of the testator's personal estate, held, upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty. *Byam* v. *Munton*, 532

21, A testator devised in the following words—"As to the rest of my estate, the two houses in St John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my loving wife Mary Mayer, for life, and after her decease, that in St

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John's Lane to my daughter Mary Mayer, the other between my two sons John and Joseph Mayer, to be equally divided; as to the rest of my estate, of what nature soever, one-third to my wife, and the rest to be divided equally among the three children." Held, that the daughter took only an estate for life in the house in St John's Lane. *Esdale* v. *Gaul*, 549

22, A devise of real estate to all the younger children of the testator's daughter, as tenants in common, with a devise over in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be devested in that event, unless a different interest appeared from the subsequent part of the will. The first husband of the daughter was living at the time of making the will, and at the death of the testator, and although it was plain that the testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage. *Critchett* v. *Taynton*, 550

23, Whether the expression in a will, "in case of death," refers to a death in the lifetime of the testatrix, or to a death at any time, depends upon the context. *Tilson* v. *Jones*, 556

24, Where a testator gives legacies to children, provided they attain twenty-one, with a gift over if the children die before twenty-one, and appoints trustees and guardians to the children, with a request that they will attend to their education, the children are entitled to the interest of their legacies for their maintenance and education, until they attain twenty-one or die under that age. *Mills* v. *Robarts*, 557

25, A testator devises lands to R. in fee, and reciting that he has executed a bond for the due payment of a certain annuity, he charges the lands so devised, and also the said R., his heirs, executors and administrators, with the payment of that annuity; he then gives divers pecuniary legacies, and directs the residue of his personal estate to be divided equally between R. and W.: Held, that the annuity is primarily a charge upon the lands devised, and upon R. personally, in exoneration of the personal estate. *Welby* v. *Rockcliffe*, 560

26, Whether a sum directed to be raised out of the rents and profits of a real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention, to be collected from the context of the will, and from the purposes to which the money is to be applied. *Wilson* v. *Halliley*, 567

27, Where a testator directs a government annuity of a certain amount to be purchased for his wife within a given time, and the wife, at the request of the executors, assents to postpone the time of purchase, and afterwards dies before it is purchased, her personal representative will be entitled to the sum which would have purchased the annuity. *Dawson* v. *Hearn*, 575

28, A testator gave to his wife the residue of his personal property, with a proviso, that if not disposed of by her in her life or by her will, it should go over. It passed, as part of her property, by her will, although not specifically noticed. *Bourn* v. *Gibbs*, 580

29, A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken wife. *Garratt* v. *Niblock*, 588

30, A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A., and next to apply the rents to the maintenance, education and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.: Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham* v. *Mee*, 588

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31, Where a testator gives to three different persons, three leasehold estates, one of which is mortgaged, and directs that the mortgage shall be paid out of his residuary personal estate, which proves insufficient for that purpose, the legatee of the mortgaged leasehold takes it *cum onere*, and the legatees of the other leasehold shall not contribute towards the payment of the mortgage debt. *Halliwell* v. *Tanner*, 590

32, A testator gave the residue of his estate to trustees, upon trust, to pay the dividends to A. during her life; and after her death, to transfer the trust-moneys to his two nephews B. and C., share and share alike; and if either of his nephews died before his share of the trust-moneys became payable, without leaving issue, the share of him so dying was to go to the survivor; B., one of the nephews, died in the testator's lifetime, and left no issue: Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C. *Humphreys* v. *Howes*, 593

33, A direction in a will, that the testator's brother should be his executor to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favour of the daughter. *Davis* v. *Davis*, 596

34, A gift of a sum of money to one, to be paid out of the produce of a real estate, directed to be sold, followed by a gift to others, of the residue of that produce, is substantially a gift of the whole estate, and not a gift of legacies, with a collateral charge upon the estate; and these gifts are adeemed, if the testator sell the estate in his lifetime. *Newbold* v. *Roadknight*, 610

35, A testator having by his will given an interest for life in a sum of stock to two persons, and the survivor of them, with remainder to another for life, and afterwards to the children of such other person, by a codicil substitutes an annuity nearly equal to the amount of the dividends of the stock, in the place of the first gift: the gift in remainder is not thereby accelerated; but its value is to be computed according to the price of the stock, at the time of the testator's death, when, but for the substitution, the gift of the prior life interest would have taken effect. *Davis* v. *Rees*, 615

WITNESS.

1, Where a witness is served with a subpœna to produce deeds on the execution of a commission, it is not necessary that there should be a written interrogatory as to the fact of his having them in his possession; and if he then takes upon himself to refuse production, he does so at the peril of costs in the event of his failing to satisfy the court of his right to withhold them. *Bradshaw* v. *Bradshaw*, 464

2, In equity, an objection to the competency of a witness is not waived by cross-examination. *Pigott* v. *Croxall*, 499

3, Where the question in the cause turned upon the fact of notice of a settlement, and the names of the witnesses, and the particular facts of notice were not stated in the bill, so that the defendant had no opportunity to meet their testimony, an inquiry as to the fact of notice was directed before the master. *Earle* v. *Pickin*, 553

4, On appeal the decree was varied by directing an issue to try whether the circumstances relied upon to prove the notice took place prior to a stated day, after which notice would be immaterial. *Ibid.*

5, Whether the court will, under special circumstances, direct witnesses examined in the cause, to be examined to the same points before the master, *quære*. *Ibid.*

END OF VOL. IV.

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